No. 209.

By Atty. Gen'l (Hoyt), for D.C.

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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

ALLEJANDRO BARKER ET AL., PLAINTIFFS in error,
v.
J. DOWNEY HARVEY, ADMINISTRATOR OF the estate of John G. Downey, deceased, and the Merchants' Exchange Bank of San Francisco. } No. 209.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE PLAINTIFFS IN ERROR.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Involving the possessory rights of Mission Indians on confirmed and patented Mexican grants in California as against the patentee—the Indians' claims never having been presented for confirmation to the Board of Land Commissioners created by the act of Congress of March 3, 1851.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is an action to quiet title to, and recover possession of, certain lands in San Diego County, Cal. The plaintiffs assert title to the lands in controversy, under and by virtue of a United States patent based upon two confirmed Mexican grants, such patent having been issued under and in pursuance of proceedings

had under the act of Congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."

The defendants in possession claim to be Mission Indians, and that they have been in the possession, use, and occupancy of these lands ever since a time long prior to the date of the Mexican grants upon which plaintiffs' title is based, and that during all of such time they have claimed the right so to use, occupy, and possess such property as against all the world, without, however, the right to dispose of the same; and they claim that under and by virtue of the Spanish and Mexican law existing in the ceded territory prior to the transfer of sovereignty to the United States, Indians, such as these, were entitled for themselves and their descendants to the continued use and occupancy of the lands of which they were possessed and which they were using, so long as they or any of their descendants remained in such possession and use, without, however, having the power of alienation; and that all private grants of such lands made by the Mexican Government, were under the law subject to such general right of use and occupancy in the Indians, although the grants including such lands were silent upon this subject. Defendants further claim, however, that in the grant upon which plaintiffs' title rests, the defendants' right to continued use and occupancy of these lands was expressly preserved and protected; and they claim that, under and by virtue of the provisions of the treaty of Guadalupe Hidalgo between the

United States and the Government of Mexico, their usufructuary rights in these lands were preserved and protected.

Defendants never presented their claim to their usufructuary rights in these lands, to the Board of Land Commissioners, appointed under the act of Congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and it is their claim that they were relieved of the necessity of presenting their claims to such board, for the reason that the sole purpose of the act of Congress in question was to segregate private property from public domain, and to fix the boundaries of each, and that proceedings had, and patents issued thereunder, were binding upon the United States and the claimant only, and upon parties claiming under the United States by title subsequent to the change of sovereignty, but were not binding upon "third persons" claiming an interest in the lands by a right or title prior and paramount to that confirmed and patented. And defendants claim that the requirements of such law as to these lands were fully met and complied with, and such lands adjudged to be private property and not a part of the public domain, by the presentation to the Board of Land Commissioners of the claim of one Juan J. Warner therefor (plaintiffs' predecessor in interest, one of the original grantees from the Mexican Government), and by the confirmation and patenting of such claim; that this vested the legal title in Warner, and operated to relieve the defendants from the necessity of presenting their claims to such board, but did not change the

character or extent of Warner's claim or title, but the same remained, just as formerly, subject to the usufructuary rights of the defendants and charged with and subject to all of the lawful uses previously existing. That the defendants are "third persons" as such term is used in the fifteenth section of the statute in question, whose rights are not concluded by proceedings had thereunder; that as under the Mexican régime the grantee held the legal title in trust for the defendants, who were the beneficial owners entitled to the use and enjoyment of the lands, this relation of privity of estate and trust was not cut off or extinguished by confirmation and patent to the grantee Warner.

Defendants further claim, that they were wards of the Mexican nation, and by the transfer of sovereignty became, and ever since have been, wards of this nation, and that it was not intended that they should be compelled to present their claims to the Board of Land Commissioners for confirmation, under penalty of forfeiture for failure so to do.

Plaintiffs, on the other hand, claim that their patent from the United States is conclusive of the entire controversy, and that all evidence as to the defendants being Mission Indians, or as to their ancient and continued use, occupancy, and possession of these lands is immaterial and inadmissible, and all of such evidence was objected to on that ground. All testimony of defendants was introduced under such objections of plaintiffs and was permitted to be received, but such

objections thereto were subsequently—over three years after the cause had been submitted—sustained, and all of such testimony of defendants stricken out and judgment given for plaintiff, and defendants' motion for a new trial denied. This position has been sustained by the supreme court of California—Chief Justice Beatty and Justices McFarland and Temple dissenting—the majority of the court having held that the patent to plaintiffs' predecessor in interest was conclusive of the entire controversy, and that all claims of the defendants were lost by not being presented for confirmation to the Board of Land Commissioners appointed under the act of Congress above mentioned; and that defendants were not "third persons" whose rights were protected under the fifteenth section of such act of Congress, but were mere strangers to the title, and that all evidence as to the former property rights of such defendants and their ancestors under the Mexican law was therefore immaterial and inadmissible, and properly stricken out.

The entire issue between the parties in the courts below was one of law and not of fact. It was as to the materiality and admissibility of defendants' evidence, and not as to the sufficiency or weight thereof, and the questions involved might all have been raised upon demurrer to defendants' answer, but this was not done.

REVIEW OF PROCEEDINGS IN THE TRIAL COURT.

Instead of settling the law of the case, upon demurrer to defendants' answer, no demurrer was filed, and the cause came on to be heard upon the issues raised

in the complaint and answer in July, 1893, before Judge Puterbaugh. Plaintiffs introduced in evidence United States patent to J. J. Warner, dated January 16, 1880, for the Rancho San Jose del Valle. (See Tr., p. 20.) It was then stipulated that the lands described in said patent included the premises in controversy; that plaintiffs had succeeded to all the rights of the patentee, and had paid all taxes levied or assessed upon the premises in controversy since the patent issued. Whereupon plaintiffs rested. Thereupon, to show that the rights of the Indians in possession were reserved by the Mexican grants on which plaintiffs' patent was based, defendants offered in evidence the complete "expedientes" of the two grants from the Mexican Government, upon which such patent was based; the first grant being made June 8th, 1840, to Jose Antonio Pico by Juan B. Alvarado, governor of California, and the second being made November 28th, 1844, to Juan Jose Warner by Manuel Micheltoreno, governor-general of California. The grant to Pico includes all of the lands in controversy. (See Tr., p. 29), and provides that the grantee shall "not molest (prejudicar) the Indians that thereon may be established." (See Tr., p. 30.) The later grant to Warner provides that the grantee will be allowed to fence it "without interfering with the roads and other usages" (servidumbres). (See Tr., p. 26.) To the introduction of these expedientes plaintiffs objected on the ground that the same were incompetent, irrelevant, and immaterial; that the patent was conclusive as to the title of the patentee and his successors in interest,

and that the antecedent proceedings and documents referred to have no bearing, and can in no manner affect the validity of the patent or its adequacy as an instrument conveying title to the patentee. The court reserved its ruling upon such objection, and the expedientes were for the time being received, the court stating that an exception would be given to the party against whom the ruling might finally be made. (See Tr., p. 23 to 31.) Subsequently, nearly three and one-half years later (the case having been transferred to another judge—W. L. Pierce—after the evidence was all in), these objections were sustained and an exception given to defendants, which ruling defendants specify as error. (See Tr., p. 31.)

Defendants next offered in evidence petition of J. J. Warner, filed before the board of land commissioners above referred to in 1852, asking confirmation of his title to the lands in controversy, which petition states that it is based upon the two grants already mentioned. Upon this petition all subsequent proceedings for the confirmation of Warner's title and the ultimate issue of patent are based. This evidence was objected to on the same grounds as urged to the admission of the expedientes of the two grants, and the petition was filed and the ruling of the court reserved, and subsequently, three and a half years later, in December, 1896, such objection was sustained and an exception given to defendants (see Tr., pp. 31 and 32), which ruling defendants specify as error.

Defendants then offered certain depositions, and a

large amount of oral testimony, wherein the parties deposing or testifying stated that the defendants and their ancestors were Mission Indians; that they had formerly been under the charge of the San Luis Rey mission; that they had been in the exclusive use, occupancy, and possession of the premises in controversy continuously ever since a time long prior to the inception of plaintiffs' title from Mexico, and beyond the memory of man, and had always claimed and exercised the right so to use such property; that they had substantial houses and good improvements thereon, and lived there with their families and obtained their subsistence therefrom. To each of such depositions and to all such oral testimony plaintiffs interposed their objections as the same were offered, the objections being the same as to the documentary evidence already offered, viz, that the patent was conclusive, and all such evidence was therefore immaterial, as it could not vary, impair, qualify, or affect the rights of the patentee; and the depositions and testimony were permitted to go in, the court's rulings being reserved. Thereafter, upon December 29, 1896, nearly three and a half years later, such objections were all sustained and exceptions granted to defendants, each and all of which rulings defendants specify as error. Such depositions and evidence so held to be immaterial are set forth in transcript, pages 32 to 54.

Upon defendants resting, plaintiffs introduced certain evidence, with the understanding that if their objections to defendants' evidence was ultimately sus-

tained by the court the rebuttal was to be withdrawn. Such rebuttal evidence was confined to an attempt to show that plaintiffs' patent rested, not on the grant of 1840, but upon the grant of 1844, and to showing that during recent years plaintiffs' use for pasture purposes of a portion of the lands claimed by them had been somewhat restricted by defendants, and to proving that during recent years defendants had enlarged their area of cultivated lands.

In December, 1896, findings and judgment were given by the court in favor of plaintiffs, "*all of the objections interposed by plaintiffs to the evidence introduced by defendants having been sustained by the court and the sufficiency or effect of such evidence not being considered or regarded by the court in rendering its decision.*" (See Tr., p. 61.) This left no evidence for the defense before the court whatever, it all having been objected to and all objections sustained.

Defendants moved for a new trial upon the minutes of the court, and incorporated in their notice of intention to move for new trial their grounds of motion and a detailed designation of the errors of the court to be relied upon on such motion. (See notice of motion, Tr., p. 61 to 69.) This motion was denied by the court and appeal was taken to the supreme court of the State from the judgment and from such order denying defendants' motion for new trial.

The supreme court of California upon appeal, by a divided court, affirmed the judgment of the lower court, the opinion of the majority being written by Justice Van Dyke and concurred in by Justices Harrison,

Garoutte, and Henshaw, while Chief Justice Beatty and Justices McFarland and Temple dissented. (See opinion in transcript, pp. 70 to 81. See *Harvey* v. *Barker*, 126 Cal., 262.) Writ of error was prosecuted to this court, specifications of error being found on page 85 of the transcript. Defendants relied upon the law as stated in the case of *Byrne* v. *Alas* (74 Cal., 628), a case practically on all fours with this case, as being conclusive of the law in their favor. Plaintiffs relied upon the case of *Botiller* v. *Dominguez* (130 U. S., 238) as overruling *Byrne* v. *Alas*, and the court sustained the plaintiffs in this contention, and affirmed the decision of the trial court, and also held that the case was distinguished from *Byrne* v. *Alas* in that the later grant under which plaintiffs here claim, contains no language preserving the Indians' rights, and that defendants were estopped from showing they were in possession when that grant was made by certain reports of the Mexican officials that the lands were then vacant. In this brief we will first present briefly our views of the law, and will then review somewhat fully the reasoning and authorities relied upon by the majority of the California supreme court in this case as defeating our contention.

POINTS DECIDED IN THE CASE UNDER REVIEW; AND THE RESPECTS IN WHICH SUCH DECISION IS IN CONFLICT WITH BYRNE v. ALAS, 74 CAL., 628, UPON WHICH DEFENDANTS RELY AS FIXING THE LAW OF THIS CASE.

The following are the vital points in the decision sought to be reviewed, and the respects in which it impairs the law as announced in *Byrne* v. *Alas* (74

Cal., 628)—*the case upon which defendants here rely as fixing the law of this case, and as conclusive of this controversy.*

First. The law as to what were the landed rights of Mission Indians under the Spanish and Mexican régime, as laid down in *Byrne* v. *Alas*, is in no way impaired or controverted by the decision rendered in this case. Such law, therefore, still stands as the law of California, and in this brief we will assume that it remains unaffected, and that these defendants under the Spanish and Mexican law had the right for themselves and their descendants perpetually to possess, occupy, and use these lands, without, however, the power of alienation: provided they were in the possession, use, and occupancy thereof when the grants under which plaintiffs claim were made; and provided we are not precluded—by the patent or by the alleged report of the Mexican officials that they were vacant—from proving that the Indians were then in possession.

So much, therefore, of *Byrne* v. *Alas* is left in full force and effect as holds that under Spanish and Mexican law "whenever Indian settlements are established, and the Indians till the ground, they have the right of occupancy in the lands they need and use, and whenever a grant is made to include such settlements, the grant is subject to such occupancy."

Second. In the decision in this case it is held that we are not permitted to go behind a patent in a case like this.

So even though this case be conceded as on all fours with *Byrne* v. *Alas*, it will not avail the defendants

here, as the opinion under review holds that *Byrne* v. *Alas* "can no longer be considered as authority" upon this subject, as it is held to be in conflict with the subsequent decisions of the supreme court of California and of the United States courts as to the necessity of presenting *all* claims to the Board of Land Commissioners for confirmation; and contrary to the established law as to who constitute "third persons" under section 15 of the act of Congress of March 3, 1851 (9 Stat. L., 631), who are not bound by decrees and patents under such act.

Third. In the opinion under review, the present case is distinguished from *Byrne* v. *Alas* in the following respects, which are claimed to be material: (*a*) Here the investigation and report of the Mexican officials made in connection with the grant to Warner of the "Valle de San Jose" showed it was "vacant and abandoned" and could be granted; and this, the court holds, operated as a conclusive adjudication that no Indians were then in possession of the lands here in controversy, and precluded the contrary ever being thereafter shown. (*b*) Here the court states that under the grant to Warner in this case, which was confirmed and patented, "the clause in reference to the rights of Indians is entirely omitted," whereas in *Byrne* v. *Alas* the grant contained such a clause preserving the rights of Indians.

Fourth. Here it is decided that plaintiffs' title rests entirely upon the junior grant to Warner, and not upon the senior grant to Pico, which specifically reserves the Indians' rights, and that the word "servidumbres,"

used in the grant to Warner, was not equivalent to a clause preserving the rights of the Indians from prejudice.

Fifth. The court finally concludes in this case that "the decision of the Land Commissioners and other appropriate officers of the Government of the United States, holding to the effect that the land in question was at the time it was granted vacant and subject to absolute alienation, is conclusive on the defendants and all others."

The court being with us upon the first point above mentioned as to the former property rights of such Indians as these under the Spanish and Mexican law, and the decision of the California supreme court upon this question being binding upon this court, it is unnecessary for us to present authorities in this brief in support of that position.

DEFENDANTS' POINTS STATED.

First.

THE POSSESSORY LANDED RIGHTS OF MISSION INDIANS WERE PROTECTED AND PRESERVED BY THE GENERAL LAWS OF MEXICO, AND GRANTS WHICH INCLUDED INDIAN SETTLEMENTS, THOUGH SILENT ON THAT QUESTION, WERE SUBJECT TO THE CONTINUING RIGHTS OF USE AND OCCUPANCY IN THE INDIANS.

This is established by *Byrne* v. *Alas* (74 Cal., 628) and is not controverted by anything in the opinion under consideration, it only being held in such opinion that we are precluded from showing the fact of Indian

possession, from which such rights result. The decision of *Byrne* v. *Alas* on this subject, construing the law of Mexico formerly applicable to property rights in California, is binding upon this court just as the State court's construction of its own local statutes would be.

Second.

THE GRANTS UNDER WHICH PLAINTIFFS CLAIM ARE NOT SILENT, HOWEVER, AS TO THE DEFENDANTS' RIGHTS, BUT IN THE SENIOR GRANT TO PICO—WHICH DEFENDANTS MAINTAIN CONTROLS—IT IS PROVIDED THAT THE GRANTEE "SHALL NOT MOLEST (PREJUDICAR) THE INDIANS THAT THEREON MAY BE ESTABLISHED:" AND IN THE JUNIOR GRANT TO WARNER—WHICH PLAINTIFFS MAINTAIN CONTROLS—THE INDIANS' RIGHTS ARE PRESERVED BY THE PROVISION THAT THE GRANTEE SHALL NOT INTERFERE WITH THE "SERVIDUMBRES," WHICH DEFENDANTS CLAIM INCLUDED ALL EXISTING USAGES, EASEMENTS, AND SERVITUDES.

Third.

THAT THE LAW OF BYRNE V. ALAS HAS NOT BEEN OVERTHROWN BY SUBSEQUENT DECISIONS AS TO THE CONCLUSIVENESS OF PATENTS BASED UPON MEXICAN GRANTS, OR AS TO WHO CONSTITUTE "THIRD PERSONS" NOT BOUND BY PROCEEDINGS HAD UNDER THE ACT OF CONGRESS OF MARCH 3, 1851. (9 Stats. L., 631.)

And upon this subject we claim:

(*a*) That none of the decisions cited by the court in this case hold that it was necessary for "third persons"—as such term is used in the act of Congress of

March 3, 1851—to present their claims to the board of land commissioners, but such decisions refer alone to the necessity of presenting all claims *except those of "third persons."*

(*b*) "Third persons" are those persons whose rights are prior and paramount to the claim that was presented and confirmed, and who sustain some privity with, or trust relation to, such presented and confirmed claims; such third persons are not cut off by proceedings had under such act, but they can take advantage of and claim the benefit of such proceedings as were had thereunder. If no proceedings were had thereunder, there can of course be no "third person" not bound thereby.

The Indians' right of occupancy, under the former sovereignty, constituted him the beneficial owner of the property. The grant constituted the grantee the legal owner, who held the title in trust for the Indians, and subject and subordinate to the latter's equitable rights therein. That a trust as to title necessarily exists wherever the title stands in one party and the right to use and enjoy in another; and where such relation of trust and privity exists it is immaterial whether it is created by contract of the parties, by reservation in the grant, or by operation of law; the privity of estate thus existing does not depend upon the mode or method of its creation, but upon the essential characteristics of the relationship.

There was no essential antagonism or hostility between the grantee's and the Indians' title; they might and did coexist, without either being destructive of

the other. The use in one person, and the legal title in another, is entirely reconcilable, and exists wherever an easement, usufructuary right, or servitude exists. The case, therefore, is wholly different from that of two entirely independent grants, each purporting to vest complete, antagonistic, and irreconcilable titles, so that the confirmation and patenting of one could not inure to the advantage of the other—there being no trust relation or privity between them.

We therefore insist that as the Indians' rights in the property under the former sovereignty were prior and paramount to the rights of the grantee, and as there was a relation of trust and privity between the Indians, having the right to use, and the grantee, having the right to dispose of the property, that the Indians are in the fullest sense of the term "third persons" under the 15th section of the act of Congress of March 3, 1851; that their rights were not prejudiced nor cut off by their failure to present their claims to the Board of Land Commissioners, and that the presentation, confirmation, and patenting of the grants to Warner segregated these lands from the public domain and satisfied the requirements of the statute and inured to the benefit of the Indians and operated to vest in Warner the legal title, subject, just as it was before the change of sovereignty, to the continued right of use and occupancy in the Indians.

Fourth.

CONCERNING THE COURT'S HOLDING, THAT THE REPORT OF THE MEXICAN OFFICIALS THAT THE "VALLE DE SAN JOSE" WAS "VACANT AND ABANDONED" DISTINGUISHED THIS CASE FROM BYRNE V. ALAS, AND OPERATED AS A CONCLUSIVE ADJUDICATION THAT NO INDIANS WERE IN POSSESSION OF THE LANDS HERE IN CONTROVERSY AND THEREAFTER PRECLUDED THE CONTRARY FROM BEING SHOWN.

Our points are:

(*a*) This case can not be distinguished from *Byrne* v. *Alas*, in so far as the report of the prefect that the lands were "vacant" is concerned; as the report of the prefect in *Byrne* v. *Alas* did likewise.

(*b*) The words "vacant and abandoned" used in the report of the prefect refer only to the occupancy of the recognized proprietor—the San Diego Mission—and do not apply to Indian occupation.

(*c*) Even if the words "vacant and abandoned" could be considered as referring to the Indians' occupancy, the report did not operate as an adjudication, concluding the Indians, but is only in the nature of evidence, and subject to be overcome, and has been overcome, by better evidence.

(*d*) The evidence unmistakably shows that the tract of land to which such investigation and reports applied did not cover the tracts in controversy here, and, therefore, can not be conclusive as to the possession of these tracts.

(e) On this subject we maintain that plaintiffs' title as to the land here in controversy rests entirely upon the senior grant to Pico, which expressly preserves the rights of the Indians, and has no recital that the lands are vacant.

Fifth.

THAT THERE HAS NEVER BEEN ANY DECISION OF THE LAND COMMISSIONERS OR OF ANY OTHER OFFICERS OF THE UNITED STATES, EITHER "IN EFFECT" OR DIRECTLY, "THAT THE LAND IN QUESTION WAS VACANT AND SUBJECT TO ABSOLUTE ALIENATION" SO AS TO CONCLUDE THE THIRD PERSONS REFERRED TO IN THE ACT OF MARCH 3, 1851; AND, THAT HAD SUCH COMMISSIONERS AND OFFICERS SO HELD, IT WOULD NOT BE BINDING UPON "THIRD PERSONS" AS SUCH TERM IS USED IN THAT ACT.

Sixth.

DEFENDANTS' RIGHTS WERE PRESERVED BY VIRTUE OF THE 16TH SECTION OF THE ACT OF CONGRESS OF MARCH 3, 1851, EVEN THOUGH THEY WERE NOT SUCH "THIRD PERSONS" AS ARE PROTECTED BY THE TERMS OF SECTION 15 OF SUCH ACT.

Seventh.

THE DEFENDANTS HAVE ACQUIRED A PRESCRIPTIVE RIGHT TO THE USE OF THESE LANDS.

Eighth.

THIS COURT SHOULD, UPON THE RECORD BEFORE IT, DECIDE THE ENTIRE CONTROVERSY, BOTH AS TO THE LAW AND THE FACTS.

In support of these several points of the defendants, we submit the following argument:

ARGUMENT.

First.

THE POSSESSORY LANDED RIGHTS OF MISSION INDIANS WERE PROTECTED AND PRESERVED BY THE GENERAL LAWS OF MEXICO, AND GRANTS WHICH INCLUDED INDIAN SETTLEMENTS WERE SUBJECT TO THE CONTINUING RIGHT OF USE AND OCCUPANCY IN THE INDIANS, THOUGH SILENT ON THE SUBJECT.

Under the Mexican law existing in California at the time of the inception of the plaintiffs' rights by grant from the Mexican Government and up to the transfer of sovereignty to the United States, Indians, such as the defendants here, had the right to occupy and use such public lands as they were occupying and needed; and whenever a grant was made which included an Indian settlement, the grant was subject to the continuing right of use and occupancy in the Indians; that is to say, the grantee by his grant acquired the fee burdened with and subject to the continuing servitude of Indian use and occupancy—the legal title being in the grantee, the beneficial title (with no power of alienation) in the Indians, subject to extinguishment only by abandonment on the part of the Indians, whereupon the beneficial title was swallowed up and merged in the fee. Such was decided by the supreme court of California in *Byrne* v. *Alas* (74 Cal., 628) to be the law applicable to the rights of Mission Indians upon Mexican grants in California.

The correctness of the doctrine there established has never been questioned in any subsequent decision of that court, nor even in this case; and such decision is the law of California on the subject to-day, and is binding not only upon the courts of that State, but also upon the Supreme Court of the United States. See the case of *Christy* v. *Pridgeon* (4 Wall., 196), which holds that the interpretation placed by the highest State court upon Mexican law formerly applicable to lands within such State is binding upon the United States Supreme Court, just as though such law were a local statute of such State, no matter what the United States Supreme Court might think of the original soundness of such interpretation of the law. That the case of *Byrne* v. *Alas* did establish the rights of Indians under the Mexican law, and that such decision is binding upon the Federal courts, see *Apis* v. *United States* (88 Fed. Rep., 931–939). There, in referring to the rights of Mission Indians to the use and occupancy of lands under the Mexican law, the court says "That the Indians here thus occupying the land in 1845, then had, and now have, valid rights, has been settled by the supreme court of California (*Byrne* v. *Alas*, 74 Cal., 628; 16 Pacific, 523): and its interpretation of the law is binding upon the Federal courts (*Christy* v. *Pridgeon*, 4 Wall., 196)."

The doctrine that the State court's established interpretation of its own local statutes, is binding upon the United States Supreme Court, is too well established to require a citation of authorities. The conclusions

reached by the California supreme court in *Byrne* v. *Alas* as to the landed rights of the Mission Indians under the Mexican law, is in accordance with the great weight of authority, and is supported by sound and convincing reasoning; but its soundness is not open to question, or subject to debate in this proceeding. *It is final*, and establishes the law on this subject in California and constitutes every grantee of a Mexican grant, covering a Mission Indian settlement, the owner of the legal title, burdened with a prior and continuing beneficial use in the Indians. *Byrne* v. *Alas* fixes the nature of the Indian title, and holds it to be prior and paramount to the grantee's title; and throughout the argument of this case this status of the Indian title under the former sovereignty must be conceded and should be borne in mind; to our mind it is determinative of the whole case, for fixing, as it does, the possessory rights of the Indians under the Mexican systems to have been *valid, lawful rights*, and establishing them to be *prior and paramount to the rights of a subsequent grantee* from the Mexican Government, it necessarily follows that *their rights are such as are not concluded or cut off or extinguished* by proceedings and patent under the act of Congress of March 3, 1851.

So much of the case of *Byrne* v. *Alas as determines the nature and extent* of the Indians' landed rights under the Mexican law is not affected or changed by the decision of the supreme court of California in this case. But so much of the decision in *Byrne* v. *Alas* as held that a United States patent based upon a confirmed

Mexican grant is not conclusive as against Mission Indians who were occupying the lands when the grant in question was made, and who never presented their claim to the Board of Land Commissioners for confirmation, was distinctly reversed and overruled by the decision of the court in this case.

Second.

THE GRANTS UNDER WHICH PLAINTIFFS CLAIM ARE NOT SILENT, HOWEVER, AS TO THE DEFENDANTS' RIGHTS, BUT IN THE SENIOR GRANT TO PICO—WHICH DEFENDANTS MAINTAIN CONTROLS—IT IS PROVIDED THAT THE GRANTEE "SHALL NOT MOLEST (PREJUDICAR) THE INDIANS THAT THEREON MAY BE ESTABLISHED;" AND IN THE JUNIOR GRANT TO WARNER—WHICH PLAINTIFFS MAINTAIN CONTROLS—THE INDIANS' RIGHTS ARE PRESERVED BY THE PROVISION THAT THE GRANTEE SHALL NOT INTERFERE WITH THE "SERVIDUMBRES," WHICH DEFENDANTS CLAIM INCLUDED ALL EXISTING USAGES, EASEMENTS, AND SERVITUDES.

IN THIS CASE DEFENDANTS' RIGHTS ARE PRESERVED BOTH BY THE GENERAL LAWS OF MEXICO AND BY THE VERY TERMS OF THE GRANTS UNDER WHICH PLAINTIFFS CLAIM.

That defendants' rights are established and preserved by the general laws of Mexico, *Byrne* v. *Alas* conclusively shows. But defendants do not rely alone upon the general laws of Mexico as preserving their possessory rights and reserving them from grants made by the Mexican Government, but they rely also upon the specific language of the grants under which plaintiffs claim, the first of which grants provides that the

grantee "shall not molest (*prejudicar*) the Indians that thereon may be established" (Tr., pp. 29 and 30): but if the plaintiffs' title is not based upon said first grant, but is based upon the second, then defendants maintain that the second of these grants, viz, the grant of 1844, by its general terms providing that the grantee shall not interfere with the "roads and other usages" ("*servidumbres*") (Tr., p. 26), preserved all the rights of the Indians thereon, and makes such grant subject to the rights of such Indians as fully as if their rights had by name been reserved. The Spanish word "*servidumbres*" is sufficiently comprehensive to embrace all that is included in our words easements, servitudes, and usufructs. This word is defined as follows by the Nuevo Diccionario de la Lengua Castellana (the standard unabridged Spanish authority corresponding with our Webster or Worcester): "Servidumbre: *el derecho ó uso que una cosa ó heredad tiene sobre otra, ó alguno sobre cosa ajena para provecho suyo ó en utilidad pública.*" The translation of which is: "The right or use which one thing, or real property (*heredad*), has over another, or which one thing has over a different thing for its own benefit, or in a public use."

Escriche's standard Spanish law dictionary, under the head of "Servidumbre," states that servitudes are divided into real and personal; the definition above given is of a *servidumbre real.* A *servidumbre personal* he then defines as follows: "La que está constituida en el predio á favor de una persona y no de otro predio, rústico ó urbano, en favor de una persona distinta

del propietario. Hay tres especies de esta servidumbre, a saber, el usufructo, el uso, y la habitación;" the translation of which is, "That (right) which results from realty in favor of a person, and not of other realty, or the right imposed on realty, country or city, in favor of some other than the proprietor. There are three kinds of this servitude, viz, the usufruct, the use, and the habitation." Escriche thus defines the "usufruct" as follows: "El derecho de Usar y gozar de las cosas, esto de aprovecharse de todas sus frutos dejando salve é ilesa la sustancia de ellas. La propiedad se compone de derecho de gozar y del de disponer de la cosa. Separados esto derechos, el de gozar se llymo usufructo, y el de disponer nuda propiedad;" the translation of which is, "The right to use and enjoy things of others (cosa agenas): that is, to utilize all their fruits, leaving safe and harmless the things themselves. The property is composed of the right to enjoy, and to dispose of the thing. Separating these rights, that to enjoy is called *usufruct*, and that to dispose of, the *bare property* (nuda propiedad)." From these definitions it is apparent that the word "*servidumbres*," as used in the grant to Warner, includes what is meant by our English word *servitudes*, *easements*, and *usufructs*. That the Indian right of use and occupancy under the Mexican law constituted a servitude upon the land, and a usufruct and easement in the land, there can be no doubt under the authorities: therefore we contend that the reservation of the existing "*servidumbres*" operated as a reservation of the Indian right

of use and occupancy, and that such purpose is just as effectually accomplished by the use of such term as though the grant had reserved "the rights of the Indians" in so many words. This reservation of the "*servidumbres*" we understand occurs in all Mexican grants in California, and shows plainly that it was the policy of the Mexican Government in making grants to preserve all existing servitudes, easements, and usufructs.

As already announced, counsel for plaintiffs maintain that they acquired title *solely through the junior grant* of 1844 above referred to, and that therefore the language of the senior grant, providing that the grantee shall "not molest (*prejudicar*) the Indians that thereon may be established" (Tr., pp. 29 and 30), can not be used in preservation of the defendants' rights in this suit.

An examination of the patent itself (Tr., p. 21) clearly shows that the same is based upon both grants, and as the land in question was included within the senior grant, the language of which specially, by name, reserves the rights of the Indians, *that grant* is conclusive in this case. But even if not conclusive, and even if it should be held that plaintiffs' rights were dependent entirely upon the junior grant—as plaintiffs claim—we maintain that the word "*servidumbres*," as above defined, is ample to protect the rights of the defendants. But we do not wish it understood for a moment that we consider the reservation, contained in either of such grants, as essential to the maintenance of defendants' rights.

Our argument as to the meaning of the Spanish word "servidumbres"—made before the supreme court of California substantially as above set forth—the majority opinion of that court disposes of in the following language: "It is useless for counsel on behalf of appellants to contend that the Warner grant is the same as the Pico grant in reference to the rights of Indians. Not to interfere with roads and other usages (*servidumbres*) under the circumstances, can not be tortured into the equivalent of a reservation in the grant to 'not molest (*prejudicar*) the Indians that thereon may be established.'"

Without either reason or authority our construction placed upon this word "*servidumbres*" is rejected as a "'ortured" construction.

If by merely quoting the definition of this much-used Spanish word, as given by the best recognized lexicographer in the Spanish language, and as expounded by the leading Spanish law writer of the age—where it is shown to be inclusive of all usufructuary rights in, and servitudes upon lands—we are subjected to the charge of "torturing" language, then we submit that the indictment should be found against those, who through the centuries have been molding and giving form and meaning to the Spanish language, rather than to one who has taken the liberty of referring to such recognized sources of authority, utterly oblivious of the fact that such a course could be considered "torturing."

Until the Spanish authorities above quoted are shown

to be incorrect or not trustworthy, or until it is shown that other equally good authorities hold that the word "servidumbres" does not include all usufructs and easements in and servitudes upon land, or until it is made clear that the possessory rights of such Indians as these did not, under the Spanish and Mexican law, constitute usufructory rights in or servitudes upon land—which was not even attempted in the opinion under review—we trust we will be pardoned if we deem it our duty to try and solve the meaning of this important word by such lights as the recognized authorities afford. If our authorities can not be refuted by equally good authority, our argument can hardly be disposed of in accordance with recognized judicial methods, merely by alleging our construction to be "tortured." As already stated, we maintain that under the Spanish and Mexican régime, the possessory rights of Indians such as these, were by force of the general law preserved as against the grantee of the legal title, without the necessity of a special or general reservation in the grant to that effect.

This is established by the many authorities quoted in *Byrne* v. *Alas*, and by the conclusion the court reached in that case; and we do not understand such position to be controverted by the decision in this case. This branch of the subject was disposed of by the court in this case as follows:

"Any argument based on the asserted rights of the Mission or Pueblo Indians under the Spanish or Mexican régime—and much of the argument on the part of

the appellants is on that line—is entirely irrelevant in this case, *as the grant under consideration did not interfere with any such alleged rights*," the theory being that it having been conclusively established by the report of the prefect that the land was "vacant and abandoned," it followed that there were no Indians thereon, and hence, of course, the grant "did not interfere with any such alleged rights," as, there being no possession, there were no rights.

Later in this brief we will show, as we believe, that such report of the prefect was not only not conclusive as to the Indian possession of the lands here involved, but that it did not even *apply* to such lands; and if we do, then the argument as to the landed rights of such Indians as these, under the general laws of Spain and Mexico, is not only relevant, but all-important, for the reason that if under the general laws of Spain and Mexico the rights of such Indians to possess, use, and occupy lands of which they were possessed, was preserved without the necessity of a special or general clause to that effect in the grants, then we submit that it is entirely unimportant whether the grants themselves, by special or general language, preserved such rights or not, and therefore in this case it is unimportant whether plaintiffs claim under the Pico grant, which specifically protects the Indians' rights, or under the Warner grant, which only protects them by the use of the word "servidumbres;" and even the meaning of the term "servidumbres" becomes unimportant. Therefore, as there is nothing in the opinion in this case in

any way controverting the doctrine of *Byrne* v. *Alas* that the possessory rights of such Indians were preserved by the general laws of Spain and Mexico without the necessity of any clause to that effect in grants of lands to individuals, we are not called upon to reinforce the doctrine as there stated.

It is our claim that the Indian rights, as they existed under the general laws of Mexico, were in no way increased, protected, or strengthened by the use in the grants of special language reserving the Indians' rights. Such language *amounted only to an official announcement of what the law on the subject was; it was merely the embodying of the general law of the land into the grant itself.* While in the absence of a law preserving the rights of the Indians, such a clause in the grant would undoubtedly have been effective to prevent their removal; *yet as the law of itself preserved such rights, it became unnecessary for the grant in so many words to do so.* It would have made no difference in the decision of *Byrne* v. *Alas* had the grant been entirely silent as to the Indians; the reservation was a mere circumstance in confirmation of the general doctrine as to what the court announces to have been the rights of such Indians under the Mexican law. Where the fact of Indian occupancy was specially called to the attention of the governor in the proceedings leading up to the grant, it was customary to insert the clause reserving their rights. This was merely done in the abundance of caution that the grantee might have full knowledge of the Indians' rights, but added no new

strength to their rights as established by the general law. In this respect the grant bears a close analogy to the United States patents based on Mexican grants, every one of which contains the clause that it shall not "affect the interests of third persons." This language adds nothing in the way of preserving the rights of "third persons," and operates only as a formal embodiment in the patent of the law on the subject, as contained in section 15 of the act of March 3, 1851. The rights of such "third persons" would be equally unaffected, even if the patent were silent on the subject; nor does the fact that it is customary to insert such clause make it necessary. It is merely inserted *so that upon its face it may be seen* that it is not conclusive as to the rights of third persons.

The many authorities quoted in *Byrne* v. *Alas* fully sustain the conclusion reached by the court as to the possessory rights of the Indians under the Spanish and Mexican laws, but in corroboration of such doctrine we submit the following additional authorities: *Cherokee Nation* v. *State of Georgia* (5 Peters, 1); *Chouteau* v. *Molony* (16 Howard, 203).

To appreciate the extent to which the opinion under review is in conflict with the law on the subject, as it had been previously determined to be in California, it is important that the court should understand exactly what was determined by the old case of *Byrne* v. *Alas*, which was upon all fours with the present case, and we will briefly state the facts in that case and what was there decided.

The law of Byrne v. Alas (74 Cal., 628).

This was an action of ejectment brought by the plaintiff, Byrne, to eject a large number of Mission Indians from a portion of the San Jacinto rancho in San Diego County, Cal., a confirmed and patented Mexican grant. The case was submitted to the lower court upon an agreed statement of facts, wherein it was admitted that the premises in controversy were within the exterior boundaries of a confirmed and patented Mexican grant, and that plaintiff held legal title thereto as successor in interest of the patentee from the United States Government; that the defendants were Mission Indians, and that their ancestors and predecessors had been in the exclusive possession, occupancy, and use of the premises, claiming adversely to all the world ever since the year 1815, and that they had never presented their claims to the land in controversy to the board of land commissioners, appointed by the act of Congress passed March 3, 1851, entitled "An act to ascertain and settle the private-land claims in the State of California." All defense of the statute of limitations was waived on behalf of the defendants.

The court was first called upon to ascertain what were the rights of such Indians to the soil under the laws of Mexico existing prior to the transfer of sovereignty, and, after reviewing the authorities on the subject, concludes that *wherever Indian settlements are established, either at the missions themselves or upon the large mission ranchos, they have a right of occupancy in the land they need and use, and whenever a grant is made*

which includes such settlements the grant is subject to such right of occupancy.

After determining, as above outlined, what were such property rights of Indians under the former sovereignty, the court, in *Byrne* v. *Alas*, next enters upon the inquiry as to what effect the confirmation of the Mexican grant, and the issue of the patent therefor, had upon the claims of the defendants, and in that connection inquires into the effect of the defendants' failure to present their claims to the board of land commissioners for confirmation and reaches the following conclusion, viz:

That as the fifteenth section of the act of Congress of March 3, 1851, provided that the decrees and patents issued under the act "shall be conclusive between the United States and claimants only, and shall not affect the interests of third persons," the rights of the Indians were thereby preserved without their claims being presented to the Board of Land Commissioners; that the patentee merely took the *legal* title in fee, subject to the Indian right of occupancy, and that all rights of the Indians and their ancestors existing before the change of sovereignty were preserved to them, *and that the confirmation of the grant to Estudillo* (the grantee from the Mexican Government) *was also a confirmation of the Indians' rights.* Estudillo merely took the legal title, and by the confirmation and patent he became a trustee for the defendants as to all rights in the property which they or their ancestors had at the time of the treaty of Guadalupe Hidalgo; and if the Indians

were entitled to possession before confirmation and patent, they were entitled to it afterwards, so long as any of the community remained in actual possession.

The court gives three reasons why the defendants were not required to present their claims to the Board of Land Commissioners, only one of which has been at all affected by the case of *Botiller* v. *Dominguez* (130 U. S., 238), or any of the other cases, upon which counsel and the lower court in this case rely as overthrowing the law of *Byrne* v. *Alas*.

The *first* reason given is, that as the act of March 3, 1851, only contemplated the segregation of private property from public domain,—and not the fixing of the respective rights of private claimants between themselves,—the presentation and confirmation of the claim of Estudillo (the Mexican grantee) operated as a presentation and confirmation of the rights of the Indians, and consequently relieved them from the necessity of such presentation. By the presentation and confirmation of Estudillo's claim, the property in controversy having been determined to be private property and not public domain, the object of the act of March 3, 1851, was fully accomplished, and no question of forfeiture of rights for nonpresentation could thereafter arise. The United States could no longer set up claim to any lands covered by such confirmation, and the only questions thereafter remaining to be determined were, what rights were acquired by the party obtaining confirmation and patent as against "third persons."

The court says: "The lands claimed by these

defendants are within the boundaries of a Mexican grant confirmed by the Board of Land Commissioners to Estudillo, it is true; but, as we have seen, *this confirmation relieved the defendants of the necessity of presenting their claims, and conclusively adjudicated the fact that the lands were private property and no portion of the public domain.*"

This reasoning applies with equal force to the defendants now at bar, and has been in no way affected or overruled by the decision of the United States Supreme Court in the case of *Botiller* v. *Dominguez.*

The *second* reason given by the court in *Byrne* v. *Alas*, why the defendants in that case were not called upon to present their claims to the Board of Land Commissioners was, "That nothing remained for them to do under the laws of Spain and Mexico to complete their right of possession. Neither was there any act or writing required on the part of the Government. *Their right was therefore complete.*"

It is apparent that in advancing this reason the court was relying upon what then seemed to be the law, viz, that it was only necessary to present to the Board of Land Commissioners *inchoate* and *incomplete* titles. There can be no doubt that this is no longer the law, as it has been changed and overruled by the United States Supreme Court in *Botiller* v. *Dominguez* above referred to, and if we were compelled to rely upon this rule alone to relieve defendants in the case at bar from presenting their claims to the Board of Land Commissioners for confirmation we would fail.

The *third* reason given by the court in *Byrne* v. *Alas*, why defendants were not called upon to present their claims to the Board of Land Commissioners for confirmation was, that section 16 of the act of March 3, 1851, provides "That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians and those who are engaged in agriculture or labor of any kind; also, those which are occupied and cultivated by Pueblo or Rancheros Indians." This language the court held indicated that Congress did not intend that the rights of the Indians should be cut off by a failure on their part to present their claims, but that it should be the duty of the commissioners to ascertain and report the tenure by which they held their lands, and for that reason Indian claims were not affected by such act.

The court in closing its decision concludes *that, as the rights of the Indians were valid rights, existing at the date of the treaty of Guadalupe Hidalgo, the patent to Estudillo was conclusive only as between the United States and the grantee; and that in view of the nature of the Indians' claims and the time when their rights attached, they are third persons within the meaning of section 15 of the act of March 3, 1851, and that, therefore, the legal title secured to Estudillo and his grantees, by virtue of the confirmation and patent, must be held by them charged with the right of occupancy by the Indians.*

The opinion in this case rejects the last conclusion of

Byrne v. *Alas*, and holds that Indians are not "third persons" within the meaning of that term, as used in the 15th section of the act of March 3, 1851, and therefore they are concluded by the patent under which plaintiffs claim.

We submit that the conclusion reached in *Byrne* v. *Alas*—except in the one particular above conceded—was sound and in accordance with the authorities, and that the conclusion to the contrary reached by the court in this case can not be sustained, and the major portion of this brief will be given to establishing this position.

THE SCOPE, PURPOSE, AND EFFECT OF THE ACT OF CONGRESS OF MARCH 3, 1851, ENTITLED "AN ACT TO ASCERTAIN AND SETTLE THE PRIVATE LAND CLAIMS IN THE STATE OF CALIFORNIA." (9 Stat. L., 631.)

The portions of the act of March 3, 1851, material to this controversy are as follows:

Section 1: "For the purpose of ascertaining and settling private land claims in the State of California a commission shall be, and is hereby, constituted, which shall consist of three commissioners," etc.

Section 8 provides "that each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims," etc., and it is made the duty of such commission to hear such

claims and decide thereon and to certify its conclusions to the district court; and appropriate appellate procedure is provided for taking the cases to the United States district and United States Supreme Court.

Section 13 of the act provides that "all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act shall be deemed held and considered as part of the public domain of the United States."

Section 15 is as follows: "That the final decrees rendered by the said commissioners, or by the district or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive *between the United States and said claimants only, and shall not affect the interests of third persons.*"

Section 16 is as follows: "That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the Mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians."

The authorities, both State and Federal, clearly show that the purpose of this act was merely to furnish a means for ascertaining the boundaries of private property, and of segregating the same from the public domain, and to relinquish all claim of the United States thereto; and that *its purpose was not the adjustment as between individuals of their private or conflicting property*

rights; and that when, by proceedings under such act, private property was segregated from the public domain, and the title and boundaries thereof confirmed, such confirmation—even when followed by subsequent patent—did not affect the rights of "third persons" therein, whose rights had their inception prior to the change of sovereignty.

The treaty of Guadalupe Hidalgo, entered into between Mexico and the United States, covering the territory embraced within the State of California, and made at the time of the transfer of sovereignty over such territory, guaranteed the protection by the latter nation of all private property interests existing under the laws of the former sovereignty. In order that some uniform and definite method of making this guaranty effective might be adopted, the first session of Congress held after the formal ratification of such treaty passed the act under consideration. This act provided the only method which this Government would recognize whereby private property in California could be segregated from the public domain. This was the sole object of such act. Neither the decree of the Board of Land Commissioners provided for by such act, nor the issuance of patent in pursuance of such decree, purported to settle the private property rights of individuals among themselves; but such decree and patent merely operated to determine the property rights as between the Government and the party presenting the claim, and all parties claiming under the Government by title subsequent. Such decree and patent did

not cut off the equities of parties as between themselves, acquired under title prior to the transfer of sovereignty. A patent based on such decree only operated as a quitclaim of the United States, and is construed only as an evidence that the legal title had passed by the grant from the former Government, or that such equities had existed under that Government in favor of the grantee as to require or justify relinquishment of the title upon the part of this Government.

Rights or equities as between the patentee and equitable claimants under the Mexican system, were not affected, nor in any way prejudiced by such patents. *Such confirmation and patent inured to the benefit of the confirmee and patentee so far as the legal title only was concerned, but determined nothing as to the equitable relations or privity of estate between the patentee and other parties holding prior and paramount equitable interests in the property under the laws of Mexico.*

And this was true, notwithstanding the fact that the holders of such equitable interests in the property had notice of the proceedings taken by the confirmee or patentee to obtain patent from the United States, and yet did not intervene to protect their rights. Such knowledge and failure to act upon the part of such claimants did not destroy their equities, nor relieve the legal title in the hands of the patentee or his successor from its trust character. This Government having decided, by the confirming and patenting of a given claim, that the property thereby confirmed and patented was private property and not a part of the

public domain, it had thereby complied with the duties devolving upon it by the treaty of Guadalupe Hidalgo, and the object of the act of March 3, 1851, was thereby accomplished.

The foregoing propositions are all fully sustained by the following cases, among others, viz:

Wilson v. *Castro* (31 Cal., 420).
Hart v. *Burnett* (15 Cal., 530).
Fulton v. *Hanlow* (20 Cal., 450).
Hardy v. *Harbin* (4 Sawyer, 536).
Townsend v. *Greeley* (5 Wall., 326).
Meader v. *Norton* (11 Wall., 442).
Carpentier v. *Montgomery* (13 Wall., 480).
Byrne v. *Alas* (74 Cal., 628).

And even the language of *Botiller* v. *Dominguez* (130 U. S., 238), relied upon by plaintiffs, concedes this to be the purpose of the act.

Third.

THAT THE LAW OF BYRNE v. ALAS HAS NOT BEEN BY SUBSEQUENT DECISIONS OVERTHROWN, AS TO THE CONCLUSIVENESS OF PATENTS BASED UPON MEXICAN GRANTS, OR AS TO WHO CONSTITUTE "THIRD PERSONS" NOT BOUND BY PROCEEDINGS HAD UNDER THE ACT OF CONGRESS OF MARCH 3, 1851. (9 STAT. L., 631.)

The holding of the court is that "we are not permitted to go behind the patent in a case like this," so even if this case can be conceded to be identical with *Byrne* v. *Alas*, it is held that this will not avail the defendants here, as the doctrines laid down in *Byrne* v. *Alas* as to the consequences of nonpresentation of

claims to the board of land commissioners and as to the scope and effect of patents based on presented claims, and as to who are third persons not concluded by such patents have subsequently been overthrown by the cases in the United States courts and in the supreme court of California.

In response to this position of the court, we make the following points:

(*a*) **NONE OF THE CASES CITED BY THE COURT AS OVERTHROWING BYRNE v. ALAS, HOLD THAT IT WAS NECESSARY TO PRESENT TO THE LAND COMMISSIONERS, FOR CONFIRMATION, CLAIMS OF "THIRD PERSONS," AS SUCH TERM IS USED IN THE FIFTEENTH SECTION OF THE ACT OF CONGRESS OF MARCH 3, 1851.**

In so far as they hold that "all claims" other than those of "third persons" must be presented, we are in full accord with them, and throughout our entire argument have freely admitted that *Byrne* v. *Alas*—in so far as it holds that it was unnecessary to present "*perfect claims*" to the board—has been overruled by the subsequent United States Supreme Court cases.

We submit that the cases cited in no way overrule *Byrne* v. *Alas* as to the "scope and effect of patents" based on confirmed Mexican grants, nor do they impair the law of *Byrne* v. *Alas* as to who constitute "third persons" whose interests are not affected by confirmation and patent of Mexican grants.

In arriving at its conclusions, the court quotes from cases which contain language stating in substance that "*all claims* for lands in California by virtue of any right

or title derived from the Spanish or Mexican Government must be presented to the board of land commissioners for confirmation." This language—"all claims" or "every claim"—is then construed by the court in its most sweeping sense, leaving out of consideration the fifteenth section of the act which preserved the rights of "third persons;" and it is then argued that as the Indians' "right or title" is "derived from the Spanish or Mexican Governments," the failure to present *it* to the board was fatal to its present maintenance. In support of this position the following cases are cited and relied upon and quoted at length, viz:

Botiller v. *Dominguez* (130 U. S., 238).

Beard v. *Federy* (3 Wall., 478).

Knight v. *U. S. Land Association* (142 U. S., 161, 201).

Houston v. *San Francisco* (47 Fed. Rep., 337).

More v. *Steinbach* (127 U. S., 70).

United States v. *Castillero* (2 Black., 17).

Newhall v. *Sanger* (92 U. S., 761).

De Guyer v. *Banning* (167 U. S., 723).

Los Angeles F. & M. Co. v. *Thompson* (117 Cal., 594).

If the purpose of citing all these cases was to show that they held that it was necessary to present all claims to title derived from the Spanish or Mexican Governments to the Board of Land Commissioners for confirmation, *including the claims of "third persons"*—as such term is used in the 15th section of the act of Congress, March 3, 1851—then we submit that such purpose

has entirely failed, *as no one of such cases holds that it was necessary to present to the land commission the claims of "third persons."* If, on the contrary, the purpose of such citation of authorities was merely to show that it was necessary to present to the board for confirmation all claims *other than those of "third persons,"* then such citation of authorities was not needed, as this we conceded throughout our entire argument. There is no controversy between the parties to this action on that subject

We have freely admitted, and it was too clear to be denied, that in so far as *Byrne* v. *Alas* can be considered as having held that it was unnecessary to present *complete* and *perfect* claims to the Board of Land Commissioners for confirmation, it has been directly overruled by the United States Supreme Court, especially in *Botiller* v. *Dominguez* (130 U. S., 238), which holds that it was just as necessary to present to the board *perfect claims*, as imperfect or inchoate claims; as the principal purpose of the act was to segregate private property from public domain, and this could not be done unless "*all claims*," both perfect and imperfect, were presented and their boundaries defined. But we have insisted that "*all claims*" as used in the Botiller and other cases, does not include, and was not intended to include, the claims of "third persons;" as the very meaning of the term "third persons," as used in the fifteenth section of the act of March 3, 1851, is those persons who hold claims prior and paramount to the claim that was presented to the board and confirmed,

and which sustain to such confirmed claim some relation of privity or trust, such as will enable them to take advantage of the presentation and confirmation of such other claim, and have it inure to their benefit and relieve them of the necessity of presenting their special claim for confirmation.

In the passage of the act of Congress of March 3, 1851, the Government was merely interested in severing private property from the public domain and in fixing the boundaries of each: not in adjusting equities or rights between the holders of legal titles and others having equitable rights or easements in or servitudes upon private property. Such equitable owners, or parties holding easements in or servitudes upon lands, were not cut off nor concluded by patent therefor being issued to the holder of the legal title; but their interests were thereby protected and preserved unchanged, neither the grantee nor the owner of the equitable estate sustaining any change whatever in the character of his title, or in his relation to the property.

ANALYSIS OF AUTHORITIES CITED BY THE COURT.

We ask the indulgence of this court while we analyze the cases cited and relied upon by the supreme court of California as upholding the conclusion reached—that the failure of the defendants to present their claim to the Board of Land Commissioners for confirmation, within the time prescribed by the act of March 3, 1851, was fatal to their rights in the premises.

The court begins the discussion of this question by

stating that the doctrine as established by that court in *Byrne* v. *Alas*, "as to the consequences resulting from nonpresentation of claims of title to lands arising under the laws of Spain and Mexico and the scope and effect of patents based on said claims of title, can no longer be considered as au hority;" and the cases cited are to sustain this proposition.

BOTILLER v. DOMINGUEZ (130 U. S., 238) is the first and chief case cited in support of this position. That was an action of ejectment brought by the plaintiff holding title under a perfect Mexican grant—which had never been patented, and which had never been presented to the Board of Land Commissioners for confirmation—against defendants claiming the property *as public lands*, subject to settlement under the public land laws. No claim for the land in controversy had ever been presented by *any one* to the Board of Land Commissioners for confirmation. It had, therefore, never been segregated from the public domain by proceedings under such act. The trial court, and supreme court of California decided that the grant *being perfect*, the grantee was not called upon to present the same to the land commissioners for confirmation. Upon writ of error the United States Supreme Court held that the act of March 3, 1851, applied as well to *perfect* as to *inchoate* grants; and consequently reversed the decision of the California supreme court. That case was different from the case of *Byrne* v. *Alas* and the case now at bar in several respects.

In that case no claim for the land in question had

ever been presented to the Board of Land Commissioners *by any one*, and it consequently had never been adjudicated to be private property. Hence, under section 13 of the act of Congress, at the expiration of two years from the passage of the act, the land became a part of the public domain. In that case no proceedings under the act of 1851 had been had, and no patent had been issued thereon, and, therefore, *in that case no question could arise as to who were "third persons"* not affected or bound by such proceedings or patent. And, furthermore, the plaintiffs in that case were not Indians—wards of the nation—relieved from the necessity of presenting their claims to the board by the provisions of the sixteenth section of the act in question. Such decision does not affect the law of *Byrne* v. *Alas*, in so far as the latter case determines what were the property rights of Indians under the Mexican law, or in so far as it construes the fifteenth and sixteenth sections of the act of Congress of March 3, 1851, nor does it militate against the position of the defendants herein claiming title under the law as established in *Byrne* v. *Alas, except in so far as it holds that it was just as necessary to present for confirmation a perfect claim as an inchoate or imperfect one.*

The language of Justice Miller in *Botiller* v. *Dominguez*, quoted by the court to the effect that it was necessary for "*every* person claiming land in California by virtue of any right or title derived from the Spanish or Mexican Government," to present the same for confirmation to the board of land commissioners, was broader than the necessities of the case before the

court warranted, and was clearly not necessary to the decision of the question there involved; and taken in its most sweeping sense would be utterly destructive of the fifteenth section of the act in question, which was intended to protect the interests of "third persons" without the necessity of compelling the presentation of their claims to the board of land commissioners. That the language of Justice Miller above quoted is much broader and more sweeping and comprehensive than the court intended, is made evident by the following language, contained in the same decision, from which it is clear that it was not intended by such decision to lay down a rule which would require all conflicting claims to the same lands, as between private parties, to be presented to the board for confirmation and adjustment as between the claimants. The language we refer to is as follows, viz:

"*Obviously it was not intended (by the statute) to adjust or settle titles between private citizens making claims to the same lands. It is equally clear that the main purpose of the statute was to separate and distinguish the lands which the United States owned as property (which could be sold to others, either absolutely or by permitting them to settle thereon with preemption rights, or which could be reserved from public sale entirely) from those lands which belonged either equitably or legally to private parties under a claim of right derived from the Spanish or Mexican Government. When this was done the aim of the statute was attained. * * * This was the purpose of the statute.*"

No stronger corroboration of the position for which we here contend can be found than is afforded by this

language. The gist of that decision, and in fact the *only point necessarily decided by it*, is that in order to determine what property in California was private property and what was public domain it was just as necessary to present *perfect* grants to the board for confirmation as to present inchoate or imperfect grants. This can be admitted and yet not make it necessary for Mission Indians on Mexican grants in California to present their claim to the Board of Land Commissioners, *where the land they occupy has already been segregated from the public domain and adjudicated to be private property by the presentation, confirmation, and patenting of the same*—all done at the instance of the grantee from the Mexican Government, who under the former sovereignty held the title thereto subject and subordinate to the Indians' right of occupancy and in trust for their use and benefit. Such presentation, confirmation, and patenting operated to segregate effectually and forever the lands in question from the public domain, and prevented the same becoming a part of the public domain under the thirteenth section of the act. *Botiller* v. *Dominguez* does not in any way conflict with the rule laid down in *Byrne* v. *Alas* as to who are "third persons" under the fifteenth section of the act of March 3, 1851. In fact, *the inquiry as to who were such "third persons" was in no way involved in or determined by such case. No proceedings were ever had under such act, and no patent had ever issued thereunder, and, therefore, no question could arise as to who were third persons not bound by such proceedings or patent.*

The next case cited by the court and quoted from at length is that of BEARD v. FEDERY, (*3 Wall., 478*). In the case of *Beard* v. *Federy*, the defendant, as a means of defeating plaintiffs' patent, which was based upon a confirmed Mexican grant, relied, first, upon another grant from the Mexican Government, which was not presented to the Board of Land Commissioners for confirmation—taking the position that the grant to plaintiff was void, and the grant to defendant was valid and perfect, and therefore need not have been presented to the board for confirmation; and, second, on his adverse possession after the change of sovereignty. The United States Supreme Court held that the decision of the Board of Land Commissioners and of the Land Department in approving and patenting plaintiffs' claim was conclusive, except as against third persons, under the act of March 3, 1851. That defendant was not such a third person, for the reason (1) that the grant under which he claimed *was absolutely void* and of no vitality whatsoever; hence he could derive no benefit from it, either as a "third person" or otherwise; and (2) that the long-continued adverse possession after change of sovereigty could not aid defendant, as this was not the claim of a third person, *as it had its origin long subsequent to the transfer of sovereignty, and was not anterior or paramount to the claim patented to plaintiff*, and hence the claim was not that of a third person protected by section fifteen of the act of Congress. We have no fault to find with the definition of "third person" as given in this decision, nor with the

result of the decision, as it was in entire accord with the law on the subject then and ever since existing. It can not be used as an authority in conflict with *Byrne* v. *Alas*, as it only holds that a void grant creates no right in its holder, and that a party claiming by adverse possession after change of sovereignty is not a third person referred to in the act March 3, 1851.

The next case quoted by the court is that of KNIGHT v. THE UNITED STATES LAND ASSOCIATION (142 U. S., 161). In that case two fee simple titles were involved, only one of which antedated the change of sovereignty, and that one was presented to the Board of Land Commissioners and confirmed and patented. The other was a claim derived from the State of California *under title subsequent to the change of sovereignty*, and therefore possessed none of the requisites of the claim of "third persons" whose rights were protected under the act of March 3, 1851. The court merely held that such subsequent claim based on title derived from the State of California was not the claim of a third person entitled to protection by section 15 of the act of March 3, 1851. The doctrine there affirmed in no way militates against our position here. There is much in such case, however, in the general language used, strongly upholding the position for which we are here contending.

Instead of being adverse to the law of *Byrne* v. *Alas*, this case is one of the strongest in the books in confirmation of many of the most important doctrines upon which *Byrne* v. *Alas* is founded; for instance, among other things, the court says:

"It is equally well settled that when the United

States acquired California from Mexico by the treaty of Guadaloupe Hidalgo they were bound under the eighth article of the treaty to protect *all rights of property*, not merely property 'owned by Mexicans' in that territory emanating from the Mexican Government previous to the treaty (citing authorities). Irrespective of any such provision in the treaty, the obligation resting upon the United States in this respect, under the principles of international law, would have been the same" (citing a great number of authorities).

The court says: "The rights of the city of San Francisco, as successor to the pueblo, were superior to any *subsequently acquired* rights of California to the tide lands."

The same language occurs a number of times later in the case, showing that the claim involved *was not of a paramount or prior character to that patented, but was a subsequently acquired right*, which, of course, was concluded by the patent to the city.

Showing another difference between that case and this, it was conceded there that Mexico had an *unquestioned right* to dispose of the lands in question—tide lands—as she saw fit; whereas, it is well established that Mexico had *no power* to convey by grant—that would cut off the beneficial title of the Indians—lands that were in the possession of such Indians as the defendants here; hence the action of the Mexican Government *in granting tide lands would be conclusive, but in granting lands in the possession of the Indians would not be conclusive as against the beneficial title of the Indians.*

In stating the effect of a patent, based upon a Mexican grant, the court in the Knight case says:

> As against the Government, this record, so long as it remains unvacated, is conclusive, and it is equally conclusive against parties *claiming under the Government by title subsequent:* * * * if parties asserting interest in lands *acquired since the acquisition of the country*, could deny and controvert this record, and compel the patentee in every suit for his land to establish the validity of his claim, etc., the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor.

In his elaborate concurring opinion in the same case, Justice Field makes an exhaustive review of the authorities on the subject. Among other things, he says:

> The title under the patent *necessarily antedated any possible claim of the State of California to the lands within the limits of the pueblo;* it went back to the acquisition of the country from Mexico; when the United States acquired California, *the inhabitants were entitled, by the law of nations*, to protection under the new Government, to *all rights of property* then possessed by them. Jurisdiction and sovereignty passed from one nation to another by the cession, but not private rights of property. *Their ownership remained as under the former Government*, and by the term *property*, as applied to lands, *all titles* are included, legal or equitable, perfect or imperfect; "it comprehends," as said by this court, in *Soulard* v. *U. S.* (37 U. S., 100), "*every species of title*, inchoate

> or complete, it is supposed to embrace those rights which are executory, as well as those which are executed;" *in this respect the relation of the inhabitants (not merely Mexicans) to their Government is not changed. The new Government takes the place of that which has passed away.*

The court proceeds as follows:

> Whatever property was ceded to the United States from Mexico, whether marsh lands or tide lands, passed subject to the obligations to protect existing claims to them of all parties. The State could take no greater interest than the United States acquired. All lands she received went under her control charged with the equitable claims of those which the United States was bound by the treaty and law of nations to protect. * * * The duty and power of the United States in the execution of their treaty obligations to protect the property claims of *all persons*, natural or artificial, were superior to any *subsequently acquired* interest of the State or individuals. Mexico owned the tide lands as well as the uplands, and it was, of course, in her power to make such disposition of them in the establishment and organization of her pueblos as she may have judged expedient.

Later in the case, in describing the effect of a United States patent, based upon a confirmed Mexican grant, the court says:

> As against the Government, so long as it remains unvacated, it is conclusive, and it is equally conclusive against parties *claiming under the Government by titles subsequent.* The patent

> being thus conclusive, *can only be resisted by those who hold paramount title to the premises from Mexico antedating a title confirmed;* that is, by persons who can successfully resist any action of the United States in disposing of the property, or in perfecting the title of the claimant.

It is apparent from this language that the case is in thorough harmony with all the prior cases and holds merely that the claimant, the United States Government, and parties claiming under the United States by title subsequent, are bound by proceedings had under the act of March 3, 1851: and it clearly admits that parties holding by a title paramount to and antedating that confirmed, which could (had it been presented to the board) have defeated or limited the title confirmed, are not bound by proceedings had under the statute.

The case, however, authoritatively decides but one point, and that is that a patent based upon a confirmed Mexican grant *can only be resisted by those who hold paramount title to the premises from Mexico antedating the title confirmed.*

The next case cited by the court is HOUSTON v. SAN FRANCISCO (47 Fed. Rep., 337). The opinion rendered in that case was upon a motion to dismiss for inexcusable failure of the complainant to prosecute. The sufficiency of the complaint, or of the cause of action contained in it was not involved in the motion. In fact the motion conceded the sufficiency of the complaint as a pleading. The affidavits used upon the motion conclusively showed the failure of the complainant to make any effort to obtain service of process for over

two years, and the court holds "for such failure to prosecute the suit the amended bill, and, indeed, the whole case, may be properly dismissed."

Our position is, that so much of the decision as passed upon the sufficiency of the cause of action set up in the complaint was unnecessary to the decision of the question involved, and therefore is not binding as authority. Furthermore, it was rendered not by the United States Supreme Court—whose decisions alone are binding upon the California supreme court or upon this court—but by the United States circuit court. But the main distinguishing feature between *Houston* v. *San Francisco* and the present case is that in that case the conflict was between a later grant and an earlier grant, neither of which referred to the other or purported to recognize the validity of the other; the grants were entirely distinct, each absolutely hostile to the other, each purporting to convey the title *in fee simple absolute, and either of which, if valid, would have been utterly destructive of the other and irreconcilably in conflict with the other.* Whereas, in the case at bar the title of the defendants is in no way hostile to the title of the plaintiffs, but the same is recognized and preserved not only by the general laws applicable to lands in the possession of Indians, but expressly recognized and preserved by the very terms of plaintiffs' grants, the senior grant preserving the same by providing that the grantee shall "not molest (*prejudicar*) the Indians that thereon may be established," while the junior grant provides that the grantee shall not interfere with

the "servidumbres." Therefore, in this case there is no necessary repugnance between the titles being asserted. *They may coexist without either being destructive to the other.* The legal title may well be in plaintiff, subject to the beneficial use or servitude in favor of the defendants.

We insist here that the recognition and reservation of the rights of the Indians in the various documents and in the law through which plaintiff must here derive title makes the preservation of the rights of the defendants a very part of the plaintiffs' title, and prevents the same being considered as hostile thereto, in the same sense in which a prior grant of the fee-simple title to one party, is hostile to a subsequent grant of the same character of title to another party—the former grant being in no way referred to in or preserved by the terms of the subsequent grant. In the case at bar the existence and validity of defendants' title is reconcilable with the existence and validity of plaintiffs' title, both under the law, and upon the very face of the grant under which plaintiffs claim. Whereas in *Houston* v. *San Francisco, the antagonism between the two claims asserted was utterly irreconcilable.* Furthermore, in this case, as has been shown, there was a privity and trust relation existing between the defendants, the owners of the beneficial title—the easement—and the plaintiffs, the owner of the legal title—the fee. Whereas in *Houston* v. *San Francisco,* no such relation existed, but the grants were absolutely hostile to each other, and each purported to pass the entire title, both legal and equitable, and *one was necessarily destructive of the other.*

Houston v. *San Francisco* is the first and only case that we know of, in which it is held that to be a "third person," who can take advantage of the presentation and confirmation of a grant to another, one must not only have a claim anterior and paramount to the title confirmed, but that there must be some equitable relation, privity, or trust existing between the parties, that will enable the third person in equity to claim the benefit of the act performed by the party whose title is confirmed and patented. This doctrine, however, does not militate against the rights of the defendants here, as already shown; for the plaintiff, under the Mexican régime, merely held the legal title subject and subordinate to the complete beneficial interest in the Indians, and in trust for them to the extent of their interests in the prop[illegible]

MORE v. STEINBACH (127 U. S., 70) is the next case referred to by the court. In that case both plaintiff and defendant claimed under confirmed and patented Mexican grants—defendant's grant being the senior. Defendant's patent did not include the premises in controversy, but plaintiff's did. Defendant sought to show that his grant was complete and perfect without presentation to the Board of Land Commissioners, and that the boundaries thereof, as fixed by "juridical possession," under the Mexican Government, included the premises in controversy, and hence *he claimed that he was not bound by the confirmation and patent to himself, which excluded such premises.* The court held that his patent was conclusive upon him and the Government; that having submitted his claim to the

Board of Land Commissioners for confirmation, and having accepted patent therefor, he could not repudiate the patent in so far as it did not give him the land, which he claimed was included within the boundaries given by the Mexican Government; but that the decision of the Board of Land Commissioners, the district court, and the land office, in issuing patent, was binding upon him as much as to the question of boundaries as to any other matter involved in the case.

The court further held, however, that the defendant's claim was not perfect under the Mexican law, as he claimed it to be, as the Mexican authority ceased upon the 7th of July, 1846, whereas the "juridical possession" relied upon to perfect the title was not given to the defendant until November, 1847.

UNITED STATES vs. CASTILLERO (2 Black, 17). No question as to who are third persons not bound by proceedings had under the act of March 3, 1851, was involved in this case.

The next case cited is NEWHALL vs. SANGER (92 U. S., 761). This case did not involve the question as to who are "third persons" under the act of March 3, 1851, but merely held that lands within the claimed limits of a Mexican grant, whose boundaries were *sub-judice*, when a later grant by the United States Congress was made to a railroad company, did not pass to the railroad company, although it should subsequently develop that such lands were excluded from, and never were properly a part of, the Mexican grant.

The next case cited by the court is DE GUYER v. BANNING (167 U. S., 723). This case in no way

involved the question as to who were "third persons," whose rights were not affected by proceedings had under the act of March 3, 1851; but, like *More* v. *Steinbach*, it was an attempt to claim land not included within the granting clause of a patent based upon a confirmed Mexican grant. The whole contention was that the decree confirming the grant fixed the true boundaries thereof, and did not contain an exception which excluded the lands in controversy, whereas the patent, based upon an approved survey by the Land Department, did contain such exception, the effect of which was to exclude from the patent the lands in controversy. The contention of the party claiming under the patent was that he was not bound by this unauthorized exception contained in the survey and in the patent, but that he could rely upon the description in the decree of confirmation. The Supreme Court held that the lands in controversy, having been excluded from the survey, to which no objection was urged, as well as from the patent issued and accepted under a decree confirming the claim, the party claiming under the patent could not recover such lands so long as the patent remained uncanceled. The case in no way overthrows or even affects the doctrine of *Byrne* v. *Alas* as to who are third persons, who are not compelled to present their claims for confirmation to the Board of Land Commissioners.

The next and last case relied on by the court is Los Angeles Farming and Milling Company v. Thompson, (117 Cal., 594). This was an action in ejectment by plaintiff—claiming under United States patent,

based on a confirmed Mexican grant—against defendants, who were mere squatters, claiming the lands to be a part of the public domain and open to entry and settlement under the United States general land laws. Plaintiffs' title was attacked on the ground that the grant upon which it was based was void as being for lands not subject to grant. *No question was involved as to the finality of such patent against parties claiming under the Mexican Government by title prior or paramount to plaintiffs' claim that was confirmed and patented.* The defendants were not claiming to be "third persons" deraigning title from the Mexican Government by title anterior and paramount to the title confirmed and patented to plaintiffs; nor were they in any way seeking to have the confirmation and patenting of the plaintiffs' claim inure to their benefit; but on the contrary they assaulted plaintiffs' patent as being absolutely void, because the lands were not subject to grant under Mexican law; and that being void, it could be attacked by the defendants, whose only claim to title was a possessory right under the United States, having its origin long subsequent to the confirmation and patenting of plaintiffs' title.

The defendants claiming under the United States by title subsequent, of course were not third persons under the fifteenth section of the act of March 3, 1851, and this court merely held that the decision of the board of land commissioners confirming plaintiffs' grant was final, no matter how erroneous, and could not be questioned in a collateral attack by parties claiming under

the United States by title subsequent. If we were relying here upon plaintiffs' grant being *void* because it granted lands that were occupied by Indians, and hence not vacant, such decision would be fatal to our contention. But we are not doing this; on the contrary, we admit the grant to be valid, but as to these lands it only passed a bare legal title subject to defendants' continued right of occupancy, and that this condition of title was not changed by the subsequent confirmation and patenting by the Government. It is our claim that the beneficial interest in the Indians continued, notwithstanding the grant, hence the grant was subordinate to the Indians' right of occupancy, and that this subordination to defendants' possessory rights remained unchanged by confirmation and patenting. It will be thus seen that the question as to who are "*third persons*" who are not bound by proceedings had under the act of March 3, 1851, *was in no way involved* in the case of *Los Angeles Farming and Milling Company* v. *Thompson;* hence such case can not be considered authority upon that subject. The decision in this case has been recently affirmed by this Court, but there is nothing in the opinion rendered in conflict with our position.

NO CASE HAS BEEN CITED, AND NONE CAN BE FOUND, WHICH HOLDS THAT A VALID, LAWFUL USUFRUCT OR EASEMENT IN OR SERVITUDE UPON LAND UNDER THE MEXICAN LAW, WAS EXTINGUISHED BY THE CONFIRMATION OF A LEGAL TITLE, WHICH LEGAL TITLE PRIOR TO THE CHANGE OF SOVEREIGNTY WAS, UNDER THE MEXICAN LAW, HELD SUBJECT TO SUCH EASEMENT, SERVITUDE, OR USUFRUCT; NOR HAS A CASE BEEN CITED HOLDING THAT AN OWNER OF SUCH AN EASEMENT,

SERVITUDE, OR USUFRUCT WAS CALLED UPON TO PRESENT THE SAME TO THE BOARD FOR CONFIRMATION, IN ORDER TO PREVENT IT FROM BEING DEFEATED BY THE OWNER OF THE LEGAL TITLE COVERING THE SAME LAND—BUT SUBJECT TO SUCH EASEMENT, SERVITUDE, OR USUFRUCT—HAVING HIS CLAIM CONFIRMED.

Had the lands never been segregated from the public domain by *any one* presenting a claim therefor, then the numerous authorities cited by the court, like *Botiller* v. *Dominguez*—holding that all claims must be presented to the board for confirmation—would be applicable; and if the plaintiffs' and defendants' claims were such as could not coexist without one being utterly destructive of the other—as is the case between two distinct grants, neither referring to the other, and each purporting to vest the absolute fee-simple title, as in *Houston* v. *San Francisco*, *supra*—it might be held that the presentation and confirmation of one would afford no protection to the other, owing to the fact that they were irreconcilably repugnant to each other and could not coexist, nor either inure to the benefit or protection of the other.

In this case the claims asserted are not irreconcilably repugnant, and may coexist, and neither result in the destruction of the other. Pico and Warner accepted their grants chargeable with a notice of the lawful rights of the Indians, which the fact of the Indian possession gave them. This easement, servitude, or usufruct in the defendants is in no way inconsistent with the legal title in plaintiffs. In fact, the very word "*easement*" implies that the fee resides in

another than the owner of the easement; otherwise a merger would take place and the easement become extinguished in the fee. In this case the abandonment of the easement, servitude, or usufruct would vest complete title in the grantee.

Thus, it must be apparent that there is not in the nature of things any irreconcilable hostility between the coexistence of the titles of plaintiffs and defendants any more than there would be in the provisions of a decree, which, by its very terms, confirmed a legal title in the plaintiffs, subject to the continued use and occupancy of the defendants. But, as the land commission was not a tribunal, organized for the purpose of trying, determining, or fixing property rights as between individuals asserting title to the same property—whether under the same or different documents—of course it was not necessary for the commission, by the terms of its decree, to have preserved the easement, usufruct, or servitude in favor of defendants.

If we are correct in our analysis of the cases cited and relied upon by the court as holding that *Byrne* v. *Alas* has been overruled as to the scope and effect of patents based on confirmed Mexican grants, it must be clear that such decisions in no way impair the law in *Byrne* v. *Alas*, except in so far as they hold that it was necessary to present to the Board of Land Commissioners *perfect grants*, as well as inchoate or imperfect ones. *None of them hold that it was necessary to present for confirmation the claims of "third persons."* Nor do they in any way change the law of *Byrne* v. *Alas* as to who constitutes such "third persons."

After discussing these cases—only three of which, as we have shown, involve the question as to who were third persons not bound by proceedings had under the act of March 3, 1851—the whole question as to whether or not the Indians are "third persons" who can take advantage of the confirmation and patent of the Warner title, and who are not bound to present their claims for confirmation, is disposed of by the court as follows:

> But it is claimed that Warner took his title subject to the trust or rights of Indians. Neither the grant nor the patent contains anything to support this contention, and there is no privity between them or the grantee, or anything from which a trust could arise in their favor as against his grant or the patent issued thereon. They are not third persons within the meaning of the fifteenth section of the act of 1851, as already shown, but are mere strangers to the record.

We discuss this conclusion of the court in the next subdivision of this brief.

(*b*) THE INDIANS ARE NOT "MERE STRANGERS" TO THE TITLE, BUT ARE "THIRD PERSONS," WHOSE INTERESTS ARE NOT AFFECTED BY THE CONFIRMATION AND PATENTING OF WARNER'S CLAIM; AND THEIR RIGHTS ARE PRIOR AND PARAMOUNT TO WARNER'S CLAIM, AND UNDER THE MEXICAN RÉGIME A RELATION OF TRUST AND PRIVITY EXISTED BETWEEN THE INDIANS, HOLDING THE BENEFICIAL INTEREST (THE RIGHT TO USE AND ENJOY), AND THE GRANTEE, HOLDING THE BARE LEGAL TITLE. THAT A TRUST AS TO TITLE NECESSARILY EXISTS, WHEREVER THE TITLE STANDS IN

ONE PARTY, AND THE ENTIRE RIGHT TO USE AND ENJOY IN ANOTHER; AND WHERE SUCH RELATION EXISTS IT IS IMMATERIAL WHETHER IT IS CREATED BY CONTRACT OF THE PARTIES, BY RESERVATION IN THE GRANT, OR BY OPERATION OF LAW; THE PRIVITY OF ESTATE THUS EXISTING, DOES NOT DEPEND UPON THE METHOD OR MODE OF ITS CREATION, BUT UPON THE ESSENTIAL CHARACTERISTICS OF THE RELATIONSHIP.

In the opinion under consideration the California supreme court has held that under the Mexican régime the defendants were "mere strangers" to the Warner title. That is, they claimed in hostility to it, and no privity or trust relation existed between them, that would constitute them "third persons" whose rights would be protected by the confirmation and patent of the Warner claim. It seems to us that these conclusions can not be reached except by a disregard of the relation that the Spanish and Mexican Government sustained to the Indians before the land was granted, and the relation which the Indians sustained to the grantee prior to the change of sovereignty.

No other nation has ever shown such solicitude for the welfare of the civilized and Christianized Indians as was shown by the Spanish and Mexican government. They were the most cherished wards of the nation, and every possible safeguard for the protection of their interests was observed. All lands in the possession of such Indians were by the nation held in trust for their continued use and benefit, and such trust was not determined by grants of the same made by the Government; but as to the land so occupied the

grantees took the bare legal title, subject to, and burdened with, the continued right of use and occupancy in the Indians, and this without the necessity of a special clause in the grant to that effect.

The whole tenor of Spanish and Mexican law on this subject supports and fully sustains this view. See the numerous authorities to that effect quoted in *Byrne* v. *Alas* and the conclusion of the court there reached, which the opinion here in no way impairs or even purports to limit or qualify. If this is a correct statement of the relation which the Indian sustained to the grantee holding the legal title under the former sovereignty, then we have in the Indian the complete beneficial use (the right to use and enjoy), lacking only the power of alienation, and subject to being lost by voluntary abandonment, and in the grantee the dry legal title, having no other virtue or vitality—except upon the contingency of extinction of the Indian title by voluntary abandonment, when both the legal and the equitable title would become merged in the grantee, and the latter's title thus rendered complete and absolute. And whether such relation was created by reservation in the grant, or by the force, effect, and operation of the general law of the land, is quite immaterial *so far as the character of the relation itself is concerned.* It needs no argument to show that where the legal title stands in one party, and the entire beneficial interest in another—either by operation of law or by contract—that there is a relation of trustee and beneficiary between them as to the property, and that there is a

privity between them; and it is quite immaterial whether such relation is created by operation of law or by contract. It is equally binding. The grantee and the occupant sustain a mutual relationship to the same rights of property, and therefore are in privity with each other, one having the right to use and enjoy, the other the right to dispose of it; or, to use the analysis of Escriche, "the property is composed of the right to enjoy and to dispose of the thing. Separating these rights, that to enjoy is called usufruct, and that to dispose of, the bare property (*nuda propiedad*)," or, as we term it, the bare legal title. Such rights may coexist in different parties.

There is no irreconcilable conflict, as between two hostile grants, each purporting to vest a complete and absolute title, which could not coexist; as one would necessarily be destructive of the other, and could not operate to inure to the advantage of the other. From the foregoing analysis of the landed rights of the Indians under the Spanish and Mexican régime, it is clear that the Indian was the beneficiary of the title, the grantee the mere trustee thereof for the Indian's benefit, with the possible contingency of becoming the absolute owner by the Indian's abandonment of his possession. That the relation of trustee and beneficiary in such a case exists it would seem difficult to deny; that such parties sustain a mutual relationship to the same rights of property, just as they would if the relation had been created by their own contract, seems equally certain, and therefore there is a privity between them. The American and English Encyclopedia of Law (1892), volume

19, page 156, says: "The term 'privity' denotes mutual or successive relationships to the same rights of property." To the same effect see 1 Greenleaf on Evidence (16th ed.), § 189; Anderson's Law Dictionary, page 813; *Stacy* v. *Thrasher* (6 Howard, 44). We submit, therefore, that there was a relation both of privity and of trust existing between the Indians in possession—the owners of the beneficial title—and the grantee under the Mexican Government, the owner of the legal title; and that the claims of the Indians were anterior and paramount to those of the grantee, and hence the Indians were "*third persons*" under section 15 of the act of Congress of March 3, 1851, whose rights were not affected by the confirmation and patent of the claim of the grantee. This provision of the act of March 3, 1851, has been frequently construed by the supreme court of California, and the United States Supreme Court, and it has always been held that third persons therein referred to are those holding under title which accrued prior to the change of sovereignty, and which was paramount and superior to that confirmed.

Had Warner by his own contract with these Indians, prior to the change of sovereignty, given them and their descendants just such a right of use and occupancy of these lands as we are now claiming they possess as a result of the general laws of Spain and Mexico, it certainly would not be then denied that they would be "third persons," protected by the confirmation and patent to Warner, and that his action in obtaining patent inured to their benefit, just as much as it would inure to the benefit of his lessee or mortgagee; this being

so, why should not their rights be equally protected when created by positive law instead of by contract? The rights are identical in character, the relationship is the same, regardless of how created, and the law affecting it is the same. The estate existing in the Indians is in no way different; the same privity of estate and the same trust relation exists; there being no distinction except in the mode or method of creating the relationship, there is no distinction in the law pertaining to and governing it; and if when created by contract, the holder of the right of use and occupancy is a "third person," he is equally so when created by operation of law. He is no more a "stranger to the title" in one case than in the other. When the relation is created by contract he is a "party to the title" by virtue of *two* laws, viz, the general law of contracts and the law permitting governors to grant lands; whereas, when the relation is created by the general law of the land, he is a party to the title by virtue of the *single* law that all grants of lands in possession of such Indians are made subject to their continued right of use and occupancy.

AUTHORITIES DEFINING THE MEANING OF THE PHRASE "THIRD PERSONS" AS USED IN THE ACT OF MARCH 3, 1851, AND SHOWING THE EFFECT UPON SUCH, OF CONFIRMING AND PATENTING MEXICAN GRANTS.

By way of confirming our position that the land commissioners frequently confirmed claims, and patents afterwards issued therefor, purporting to convey absolute title, when really such confirmation and patent

passed simply the bare legal title subject to an equitable right or title in third persons, we need but quote from the opinion of Justice Field, in TOWNSEND v. GREELEY (5 Wall., 335), where he uses the following language: "Nor is there anything in the act of March 3, 1851, *which changes the nature of estates in land held by individuals or towns.* * * * By proceedings under that act imperfect rights, mere equitable claims, might be converted by a decree of the board or court, and the patent of the Government following, into legal titles, *but whether the legal title thus secured to the patentee was to be held by him, charged with any trust, was not a matter upon which either the board or court were called upon to pass. If the claim was held subject to any trust before presentation to the board, the trust was not discharged by the confirmation and the subsequent patent. The confirmation only inures to the benefit of the confirmee so far as the legal title is concerned. It establishes the legal title in him, but it does not determine the equitable relations between him and third parties.*

"It is true if the claim was presented by one designating himself trustee, executor, or guardian, or if such relation of the claimant to others appeared in the examination of the case before the board or court, the decree *might* declare that the confirmation was to the claimant in such fiduciary character. *But if the trust was not stated, and did not appear, the legal title was none the less subject to the same trust in the hands of the claimant.*" From the foregoing language it is quite apparent that it was the judgment of the Supreme Court of the United States

that a claimant who presented his claim for confirmation before the board of land commissioners *acquired no different character of title from that which formerly existed* in so far as the rights of the claimant as against other parties having equities in the property were concerned. The title referred to in the above case was that of the pueblo of San Francisco; and in that case the court held that although the confirmation and patent was to the city without disclosing any trust in favor of the inhabitants thereof, that nevertheless, as by the general laws of Spain and Mexico, the Mexican pueblo held title subject to certain trusts in favor of the inhabitants thereof, and subject to certain well-established property rights in favor of such inhabitants, that those rights and trusts were in no way cut off or divested by virtue of the confirmation and patent to the city.

The analogy between the case of *Townsend* v. *Greeley* and this case is quite apparent when it is remembered that the California supreme court in *Byrne* v. *Alas* held that if lands in the possession, use, and occupancy of civilized Indians were granted by the Mexican Government, that the grantees received the grant subject to the continued right of such Indians to so use, occupy, and possess their lands. Such being the case, it is apparent that the Indian's title—whether it be called an easement in, or a servitude upon, or a usufructuary interest in, or the beneficial ownership—was anterior and paramount to the rights of the grantee, and that the rights of such Indians had their origin prior to the transfer of sovereignty from Mexico to the United

States, and prior to any duty in the premises devolving upon the United States. Such being the case, the confirmation of the Mexican grant upon which plaintiffs' patent rests and the issuance of such patent *in no way "changes the nature of the estate in the land" held by plaintiffs.*

The supreme court of California in the case of HART v. BURNETT (15 Cal., 530), reviews at great length the general laws of Spain and Mexico, bearing upon the rights of Pueblos to the lands within their boundaries, and it reaches the same conclusion as that reached by the United States Supreme Court in the case of *Townsend* v. *Greeley*, viz: That the Pueblo title to such lands was not absolute, but was held subject to certain uses in favor of the inhabitants thereof.

In reviewing the act of Congress of March 3, 1851, the court holds that Congress "*could neither change an existing trust nor destroy existing uses*," and that as, under the Mexican system, the Pueblos had no power to alienate, change, or destroy such trust or impair former uses, the confirmation and patenting of the lands to the Pueblos gave them no such power. The court says:

> We see nothing which changes the substance of the trust. The property remained afterwards as it was before, subservient to the uses and purposes for which it was given. * * * If this trust thus impressed upon these lands has ever been changed, it rests with respondents to show how, and when, and where, and in what respect this change has been effected.

> That this property came from the Mexican Government stamped with this trust, we think we have abundantly demonstrated.

In the case of MEADER vs. NORTON (11 Wallace, 442), in referring to the act of March 3, 1851, the court says:

> Applicants for such confirmations were required to present their claims to the commissioners, when sitting as a board; but the act of Congress made no provisions for the notice to any adverse claimant, and the proceedings before the commissioners were wholly *ex parte*, unless opposed by the district attorney. * * * Nothing more is contemplated by the proceedings under that act than the separation of the lands which were owned by individuals from the public domain.

And, later in the same decision, the court says:

> Where one party claims a legal right to property to which another has a better right, a court of equity will convert him into a trustee for the true owner, and compel him to convey the legal title.

In the case of *Doolan* v. *Carr* (125 U. S., 618), the court clearly shows that lands, which either by general or special laws are reserved from grant, do not pass by patents purporting to convey the same, except in trust for the parties who are in equity entitled thereto.

In the case of WILSON vs. CASTRO (31 Cal., 421) the supreme court of California holds that the confirming of a Mexican grant and the issuing of the patent therefor to a person believing himself to have a good title thereto, but who, as a matter of fact, was mistaken

concerning the same, and who had no title thereto, does not deprive the true owners of such grant of their interest therein, although they did not present their claim to the board of land commissioners for confirmation, but that the patentee holds the legal title in trust for the true owners.

In the course of the opinion the court quotes the following significant passage on the subject of constructive trusts from Hill on Trustees, page 197, star page 144, namely:

> Whenever the circumstances of the transaction are such that the person who takes the legal estate in property can not also enjoy the beneficial interest without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner so as to convert him into a trustee of the parties who, in equity, are entitled to the beneficial enjoyment.

From the case of UNITED STATES v. MORILLO (1 Wallace, 706) it clearly appears that it was never the purpose of the act of March 3, 1851, to afford a tribunal in which conflicting rights of private parties to lands claimed from the Mexican Government could be litigated as between themselves. The court says:

> The act of March 3, 1851, under which these proceedings were had, contemplated primarily nothing more than the separation of the lands which were owned by individuals from the public domain. This is clearly expressed in the thirteenth section of that act. The fifteenth section declares that the final decree rendered in these

> proceedings, and the patents issued under them, shall be conclusive between the United States and said claimants only, and shall not affect the interest of third parties. We therefore agree with counsel for the appellant *that when the Government no longer claims that the land is public land the right of the United States to contest the case further ceases, and this court will not (in an appeal taken from such confirmation proceedings) entertain jurisdiction to determine to which of the two private claimants it may belong.*

In *Teschamacher* v. *Thompson* (18 Cal., 11) Justice Field, as chief justice of the supreme court of California, defines the "third persons" referred to in section 15 in the act of March 3, 1851, as follows:

> The "third persons" against whose interest the action of the Government and patent are not conclusive, under the fifteenth section of the act March 3, 1851, *are those whose title accrued before the duty of this Government and its rights under the treaty attached.*

In *Leese* v. *Clark* (20 Cal., 387, 425), the same eminent jurist again defines such term in the following language:

> The term "third persons" refers not to all persons other than the United States and the claimant, *but to those who hold independent title arising previous to the acquisition of the country.* The latter class are not bound by the decrees and the patent, for they do not hold in subordination to the action of this Government, nor by any title subsequent, but by title arising anterior to conquest.

In the case of *Adam* v. *Norris* (103 U. S., 591), the Supreme Court of the United States gives a most accurate and condensed statement as to the force and effect of patents issued in pursuance of the act of March 3, 1851. The court says:

> Counsel for plaintiffs have argued that the patent from the United States is final and conclusive on everybody and can not be disputed in a court of law as to the title it confers, and no doubt where the patent is for land of which the Government had an undisputed title the proposition is generally, if not always, true. *But the United States, in dealing with claimants of lands under Mexican grants, which had come into the political control of our Government by the treaty of Mexico, never made pretense that it was the owner of the land so granted by Mexico.* When, therefore, guided by action of the tribunals which the Government had established to pass upon the validity of these alleged grants, it issued a patent to a claimant, it was in the nature of a quitclaim, an admission that the rightful ownership had never been in the United States, but at the time of the cession it had passed to the claimant, or to those under whom he claimed. This principle has been more than once clearly announced by this court.
>
> The leading cases are *Beard* v. *Federy* (8 Wall., 478); *Henshaw* v. *Bissell* (18 Wall., 268); *Miller* v. *Dale* (92 U. S., 478).
>
> Such a patent was, therefore, conclusive only as between the United States and the grantee, and was evidence that as to them the claimant had established the validity of the grant.

We think it is apparent, from the foregoing authorities, that the defendants in this case are such "third persons" as are protected by the 15th section of the act in question.

As under the laws of Mexico all grants were made subject and subordinate to the continued right of occupancy of Indians in possession, it must be evident that a showing before the land commission that these lands were occupied by Indians when granted to plaintiffs' predecessor would have resulted—if the board had considered it had jurisdiction to determine the equities between the parties—in the confirmation of plaintiffs' grant being made, subject to the continuing possessory rights of the defendants, as those rights were fixed by the general laws of Spain and Mexico, and as such rights are defined in *Byrne* v. *Alas*, *supra*, and the authorities there cited.

It is immaterial whether the equities or rights of third persons which are preserved by the 15th section of the act in question grow out of a contract between the parties, or out of some act of estoppel in pais, or whether such equities grow out of the general law of the land—which law preserves the Indian rights of occupancy as against all parties—or whether the same were created by a special or a general reservation in the grants which were confirmed and patented. Whether these rights and equities are based upon contract, special reservation, estoppel in pais, or operation of the general law is unimportant.

The cases of *Doolan* v. *Carr*, *Townsend* v. *Greeley*, and *Hart* v. *Burnett*, already cited, give illustrations of

equities and trusts created by operation of law and not by contract, which are not cut off by patent.

"THIRD PERSONS," AS THAT TERM IS USED IN THE ACT OF MARCH 3, 1851, WERE NOT REQUIRED TO PRESENT THEIR CLAIMS TO THE BOARD OF LAND COMMISSIONERS FOR CONFIRMATION.

In respondent's brief in this case in the court below it was claimed "that there can be no superior title (of a third person) which had not passed the scrutiny of the board," and that "there can not be any paramount title from the Mexican Government except such title as is evidenced by the decree of the Board of Land Commissioners and subsequent proceedings under the act of March 3, 1851." So little is said in the opinion in this case in the way of defining the rights and privileges of "third persons" under the act in question, that we are unable to say as to whether or not this view of counsel has been adopted by the court. In construing the long list of cases cited by the court as being fatal to the rights of the defendant here, it would seem that the court had been influenced by this contention of counsel for respondent, and that its conclusion was equivalent to a holding that it was necessary even for "third persons" under the act of March 3, 1851, to present their claims to the board of land commissioners, or ever afterwards be debarred from asserting them. While on the other hand that portion of the opinion which holds that these defendants "are not third persons within the meaning of the fifteenth section of the act of 1851" would indicate that if they were "third

persons" their title might have been sufficient even though not presented to the board.

Being therefore uncertain as to the court's position on this important question, we submit the following argument in opposition to counsel's contention:

If, as counsel for respondents maintain, only claims which were actually presented, confirmed, and patented can be considered as claims of "third persons," protected under the fifteenth section of the act, then the fifteenth section of the act is utterly meaningless, for such claims would be protected by *virtue of the presentation, confirmation, and patent*, and not by virtue of being the *claims of "third persons" not bound by proceedings had under the act.*

To say that proceedings under the act bind all but "third persons," and at the same time to claim that "third persons" are such persons as have proceeded under the act and had their claims confirmed and patented, is to say that there are no "third persons" upon whom proceedings under the act are not binding, and hence, that all the discussion in the cases as to "third persons" has been idle, as there are and can be no such persons.

In justification of this position it may be claimed that the *sole* purpose of section 15 of the act was merely to protect the holder of a paramount title against the holder of an inferior title, *both having been presented, confirmed, and patented;* but there is nothing in the authorities to justify such a narrow or limited application of the term, and, moreover, *such a provision would not*

have been required to have protected the holder of a paramount patent, as the general law would have done this, for it is a well-settled principle of law that where two patents have issued from a granting power, the senior in right will be protected against the junior without any special statute authorizing such course, just as a senior grantee from a private grantor is protected against a subsequent deed of the same property by such grantor to another.

When the language of the statute is taken in connection with the reason and purpose of the statute, and the ends to be accomplished thereby, and especially as the same has been construed by the great number of California and United States Supreme Court cases we have cited (notably *Townsend* v. *Greeley*, 5 Wall., 335, and *Hart v. Burnett*, 15 Cal., 530), the conclusion is irresistible that Congress merely intended by the act of March 3, 1851, as said in *Botiller* v. *Dominguez*, to furnish a means of discharging its treaty obligations by segregating private property from public domain, and giving the grantee such assurance of title as would bind the overnment and parties claiming under it by title subsequent: *Provided, however, that such action should not change the nature, characteristics or extent of the estate confirmed from what it formerly was under the Mexican Government, nor affect prior and paramount claims of those whose claims were not presented; and as to such conflicting claims it was not the purpose of Congress to provide a tribunal for adjustment.*

By confirming and patenting a claim under that act

the Government's interest in the controversy ceased, and its connection with the particular lands involved thereupon terminated. It thus formally declared that the same was private property and not public domain; but the conflicting rights of title as between the claimant, whose title was thus confirmed, and those holding prior and paramount titles from the Mexican Government were left as they existed at the time of the change of sovereignty, and could only be adjusted as between the parties in the ordinary tribunals, and not before the tribunals provided by the act of March 3, 1851. Even had defendants presented their title for confirmation before the board of land commissioners, or appeared to oppose the confirmation of plaintiffs' title, it may be well doubted as to whether or not the board would not have said:

> We are without jurisdiction to try these conflicting titles; our action in confirming the legal title in Warner will in no way prejudice the rights of the Indians, but if the same were valid existing rights under the Mexican Government, and constituted an easement, or servitude, or beneficial interest to which the legal title in Warner was by law subject, such would be the case after our decree confirming Warner's title, just as it was before the change of sovereignty; as under the law creating this tribunal it has no power to change the character of or enlarge estates confirmed, but merely to confirm them as they previously existed, and its confirmation can not affect any valid, existing, prior, or paramount title in privity therewith, and the whole

> question as to whether or not such prior and paramount titles existed is a question that can be determined by the ordinary tribunals in the ordinary manner hereafter, and will not be concluded by the decree of this board.

Such an opinion would have been in entire harmony with the great weight of subsequent authority construing the scope, purpose, and effect of the act of Congress of March 3, 1851.

Fourth.

CONCERNING THE COURT'S HOLDING THAT THE REPORT OF THE MEXICAN OFFICIALS THAT THE "VALLE DE SAN JOSE" WAS "VACANT AND ABANDONED," DISTINGUISHED THIS CASE FROM BYRNE vs. ALAS, AND OPERATED AS A CONCLUSIVE ADJUDICATION THAT NO INDIANS WERE IN POSSESSION OF THE LANDS HERE IN CONTROVERSY, AND THEREAFTER PRECLUDED THE CONTRARY FROM BEING SHOWN.

On this subject our claim is—

(*a*) THIS CASE CAN NOT BE DISTINGUISHED FROM BYRNE VS. ALAS, IN SO FAR AS THE REPORT OF THE PREFECT THAT THE LANDS WERE "VACANT" IS CONCERNED.

A careful examination of the opinion of *Byrne* v. *Alas* will show that the court is clearly in error in distinguishing this case from that, on the ground that here the Mexican officials reported the property to be "vacant," whereas such was not the case in *Byrne* v. *Alas*.

At the bottom of page 636 and top of page 637, *Byrne* v. *Alas* (74 Cal.), the following appears:

> The prefect reported that the Indians were "willing that the applicants settle upon the

> place, the mentioned Indians offering furthermore that as soon as the land will be occupied, those of them who are moving about will get together and live contented: that the land formerly a part of San Luis Rey *is now vacant.*"

What could "vacant" have meant in this connection? Certainly not that there were no Indians upon the property, but merely that the land was no longer occupied by the former proprietor, the San Luis Rey Mission, and the word "vacant" has the same meaning when used in the Warner grant. Certainly this case can not be distinguished from *Byrne* v. *Alas* by saying that the report of the prefect here stated the land was "vacant," for the report of the prefect in *Byrne* v. *Alas* did likewise. This case and *Byrne* v. *Alas*, therefore, in that regard are identical. This gives force to our next point, viz:

(*b*) THE WORDS "VACANT AND ABANDONED," USED IN THE REPORT MENTIONED, REFER ONLY TO THE OCCUPANCY OF THE RECOGNIZED PROPRIETOR OR OWNER—THE SAN DIEGO MISSION—AND DO NOT APPLY TO INDIAN OCCUPANCY.

Independent of the fact that in the grant to Estudillo in *Byrne* v. *Alas* the word "vacant" can not possibly be considered as referring to Indian possession, and independent of the convincing force of the argument to be drawn therefrom that the word "vacant" in such reports generally did not apply to Indian occupancy, we think it is perfectly clear from the context in the present case that the meaning of "vacant" as here used

is clearly referring to the occupancy of the San Diego Mission. The report of the local Mexican authorities that the land was "vacant" was not intended as a denial of Indian occupancy, but merely *to show that the recognized proprietor* exercising dominion and control over the main tract of land waived all protest against its being granted; that is, as to him, it was vacant and abandoned. The sole purpose of the petition addressed to the prefect and to the priest in charge of the mission was to obtain their consent to the grant being made—a waiver of the mission's rights to the property: nothing more. The language in this case is the "'Valle San Jose' is vacant and abandoned without any goods nor cultivation on the part of San Diego, but said place belongs at the present time to said mission;" that is, it was "vacant and abandoned * * * on the part of San Diego" (Mission), "but * * * belongs to said mission." The scope and purpose of this report was evidently merely to show that as to the then proprietor—the Mission San Diego—the land was vacant and abandoned, but it can not be considered as in any way a report that no Indians were occupying the land. The language used is "vacant and abandoned * * * on the part of San Diego" (Mission), not *vacant and abandoned on the part of the Indians.*

We submit, however, that it was not proper for the court to invoke against the defendants an estoppel, based upon evidence which it held was properly excluded, and therefore not in the case. If the expediente containing the report of the prefect was under

the ruling not in evidence, its contents can not be invoked as an estoppel to prevent defendants showing they were in possession when the Warner grant was made.

(*c*) BUT EVEN IF THE WORDS "VACANT AND ABANDONED" COULD BE CONSIDERED AS REFERRING TO THE INDIAN OCCUPANCY, THE REPORT DID NOT OPERATE AS AN ADJUDICATION CONCLUDING THE INDIANS, BUT MERELY AS EVIDENCE, AND IS SUBJECT TO BE OVERCOME—AND HAS BEEN OVERCOME—BY BETTER EVIDENCE.

The report of the prefect that the lands were "vacant and abandoned," even if applicable to the Indians, is not entitled to the dignity of *an adjudication*. It was not rendered in a judicial proceeding, but was a mere ministerial act of the officer, and is not conclusive so as to preclude the contrary from being shown. At best it is but evidence, and that of a very inferior character. Its sole purpose was to enlighten the governor and departmental assembly as to the local conditions, and primarily to assure such authorities that there were no impediments in the way of the grant so far as the legal or fee simple title was concerned. It was entirely unnecessary to mention the fact of the Indian possession, as under the general law of the land such possession was not prejudiced by grants to individuals, as by the force and effect of the general law—and without the necessity of a specific reservation in the grant—the possessory rights of the Indians were protected; and, furthermore, it was customary to preserve all existing

"usages" in the grants by stating that the grantee should not interfere with the "servidumbres." Hence, it was not essential or important to refer to the possession of the Indians in such reports. Yet so solicitous were the Mission authorities for the welfare of the Indians, that it was the common practice for them, in giving their consent to the granting of Mission lands, to refer to the fact of Indian possession where it existed, and to provide that the grant should be without prejudice to the Indians' continued right to use and occupancy, and the fact that such was not done in this case—as we expect to show in the next subdivision of this argument—was because there were no Indians on the lands referred to in the report in question, as such land did not include the property here in controversy, but only included land within the jurisdiction of, and owned by the San Diego Mission, and such jurisdiction and ownership did not extend over these lands, but these lands were upon another tract of land known by a different name, within the jurisdiction of, and owned by a different mission, and four years before had been granted to another party, whose grant was still recognized as valid, and which specifically reserved and protected the rights of the Indians.

(*d*) THE EVIDENCE UNMISTAKABLY SHOWS THAT THE TRACT OF LAND TO WHICH SUCH INVESTIGATIONS AND REPORTS APPLIED DID NOT COVER THE TRACTS IN CONTROVERSY HERE, AND THEREFORE CAN NOT BE CONCLUSIVE AS TO THE POSSESSION OF THESE TRACTS.

Under this heading we have combined our argument in support of this proposition, with our argument upholding our next point:

(*e*) THAT PLAINTIFFS' TITLE TO THE LAND HERE IN CONTROVERSY RESTS ENTIRELY UPON THE GRANT TO PICO OF THE "AGUA CALIENTE," WHICH EXPRESSLY PRESERVED THE RIGHTS OF THE INDIANS, AND NOT UPON THE LATER GRANT TO WARNER.

A careful study of the record in this case shows that the place designated in the Warner expediente as "Valle de San Jose," was a separate and distinct tract of land from that designated as "Agua Caliente" in the Pico grant, and that the "Valle de San Jose" was exclusively under the jurisdiction of, and the property of the San Diego Mission; and that the "Agua Caliente" was exclusively under the jurisdiction of, and the property of the San Luis Rey Mission, and that the officers reporting on Warner's petition as to the condition of the "Valle de San Jose" land were acting on behalf of the San Diego Mission, and not on behalf of the San Luis Rey Mission, and were confining their report to the "Valle de San Jose" (upon which it is even now conceded that there never were any Indians), and that they were not attempting to pass upon the condition of the "Agua Caliente" tract, which was not within their jurisdiction, and which was admittedly, as shown by all the testimony, occupied by Indians. Hence, it must be apparent that their findings that the "Valle de San Jose" was "vacant and abandoned" in no way operated as an

adjudication, or even a report, that there were no Indians occupying the "Agua Caliente" tract, an entirely separate and distinct tract, which embraced all of the Indian villages in controversy in this action.

We submit that all of these matters are clearly established by the record in this case, as we shall now attempt to demonstrate:

That the "Valle de San Jose" and the "Agua Caliente" were separate tracts, the former being under the jurisdiction of the San Diego Mission and the latter under the jurisdiction of the San Luis Rey Mission, see testimony of J. J. Warner, Tr., pp. 46–47, where, referring to his petition addressed to the Mexican authorities asking for a grant of the "Valle de San Jose," he says: "You see here is Agua Caliente and there is El Valle del San Jose. *Now, El Valle del San Jose, so far as the Mission of San Diego is concerned, had no connection with the Agua Caliente.* When I wrote that petition I was referring to the southern half of the San Jose Valley. That is a geographical piece of land. * * * I was alluding to the Valle de San Jose in my papers addressed to the parties in charge of the San Diego Mission. About two-fifths of the valley, the southern part of it, had been occupied by the San Diego Mission. *The Agua Caliente village, however, is in the northern part of the valley, and was not included within the San Diego Mission jurisdiction.*" Nowhere in the Warner expediente is the name of the tract "Agua Caliente" used, but the tract in

question is always described as the "Valle de San Jose," and in all such documents it is alleged to be owned by or the property of the Mission of San Diego. The Warner expediente is headed "Expediente forwarded by the naturalized citizen Juan J. Warner, in petition for the place known as '*Valle San Jose.*'" (See Tr., p. 24.) Warner describes it in his petition as "Valle San Jose." The papers commented on by the California supreme court, in this case, as an investigation and report by the Mexican officials which disclosed the lands to be vacant, are the reports of Father Vincent Olivas and Juan Marron. (See Tr., p. 25.) To appreciate the scope and effect of these reports they must be read in connection with the communications of Warner, to which they are responsive. These two replies coming from San Diego officials—one the prefect and the other a priest in charge of the San Diego Mission—which declare the property therein described to be vacant, are taken by the California supreme court as conclusive that there were then no Indians on the "Agua Caliente" tract at the "Agua Caliente" village. When it is borne in mind that Warner's communications, to which these reports are responsive (Tr., pp. 24–25), describe the land as "Valle San Jose," "formerly occupied by the Mission of San Diego," and that both of the replies describe it as "Valle de San Jose" and as "belonging to the San Diego Mission," and when this is taken in connection with Warner's testimony that in his papers addressed to these parties *he was only alluding to the*

southern part of the valley, which had been occupied by the San Diego Mission, and that the San Diego Mission had no jurisdiction whatever over the Agua Caliente village on the northern portion of the ranch, and that they were two separate and distinct tracts (Tr., p. 47), it would seem conclusive *that such reports could not be deemed applicable to the possession or occupancy of another and distinct piece of property from that named*, viz, to the "Agua Caliente" located in another jurisdiction, known by a different name, and largely occupied by Indians, and in no way referred to in the communications to which such reports are responsive.

The grant to Warner itself described the lands as "Valle de San Jose" and must, of course, be considered as based upon the reports of the San Diego local officials, which, according to Warner's own testimony in this case (Tr., pp. 46–47), were referring only to "the southern part of the valley which had been occupied by the San Diego Mission" and not to the Agua Caliente village which is "in the northern part of the valley and was not included within the San Diego Mission jurisdiction." It is a significant fact that the "plan" or "deseno" describing the property covered by the Warner grant as taking in the whole valley, including the Agua Caliente, was never presented by the petitioner until many months after the local officials had rendered their reports approving the petition and reporting the lands to be vacant; and for many months after the grant had been actually made by the governor, the grant being made November 14, 1844, and

the "plan of the property" furnished for the first time May 12, 1845. (See Tr., pp. 26, 27.) It is thus apparent that it was not brought to the attention either of the local authorities or of the governor that any land was sought other than that known as "Valle de San Jose," which was within the jurisdiction, and the property of the San Diego Mission; nor was it brought to the attention of such authorities or to the governor, that the petitioner was seeking title to any land that was used or occupied by Indians (it being conceded that there were no Indians upon the "Valle de San Jose" owned by and included within the jurisdiction of the San Diego Mission); and this fact alone accounts for the absence of the usual special clause protective of the rights of the Indians, which was uniformly inserted in Mexican grants where it was known to the officials that Indians were in possession. Upon Warner's furnishing his plan of the property—some six months after the governor's action granting his petition—the fact was made to appear for the first time that Warner was attempting to cover the entire valley, including the "Agua Caliente," which latter tract was entirely within the jurisdiction of the San Luis Rey Mission, and which, under the Spanish and Mexican law, could not have been granted to Warner except by first procuring the approval of the authorities of the San Luis Rey Mission, which was never done.

That even Warner himself did not consider his grant good, as to the "Agua Caliente," is shown by the fact

that he subsequently procured a deed from Jose Antonio Pico for the Agua Caliente grant which Pico had received from the Mexican Government in 1840. And when Warner presented his claim to the Board of Land Commissioners for confirmation he relied upon both grants, and designated the lands which he claimed as "Valle de San Jose *and Agua Caliente*." The following extract from his petition to the Board of Land Commissioners explains his own interpretation of his rights in the premises: "The petition of J. J. Warner respectfully represents that he claims, by virtue of *grants* from the Mexican nation, a tract of land in the county of San Diego, in said State, known as the Valle de San Jose and Agua Caliente [note, not merely Valle de San Jose], as the same is described in the *grants* thereof and in the accompanying maps and *desenos; that so much of said land as is known as 'Agua Caliente' was on the 8th day of June, 1840, granted to Jose Antonio Pico by Juan B. Alvarado*, governor of California, and authorized to grant lands in the name and on behalf of the Mexican nation; *and the same has since become vested in the present claimant. That the remainder of said tract was subsequently granted to this claimant by a decree of concession made on the 2d day of September, 1844, by Manuel Micheltoreno*," etc. The petition further states that copies of the Pico and Warner grants were attached, and concludes by saying that "the claimant relies on the above-mentioned documentary evidence and will produce other proof should it be required by the board." It transpires in subsequent

litigation between Pico and Warner, years later, reported in 73 Cal., 17 (the case referred to in the opinion of this court), that Warner, instead of being the absolute owner of the Pico grant to the Agua Caliente, at the time of presenting his claim to the Board of Land Commissioners, only held a deed which was intended as a power of attorney, and was merely representing Pico for the purpose of having his claim confirmed. In such subsequent litigation with Pico, who sought to hold Warner as a trustee of the Agua Caliente portion of the property, Warner, it seems, succeeded in establishing to the satisfaction of the superior court that he had not taken advantage of his agency in a way that would charge him as a trustee; but, however this may be, the record before the land commission clearly shows that he claimed to be the *owner* of the Pico grant, and not the *agent* therefor, and evidently he satisfied the Board of Land Commissioners to that effect, as the opinion says: "If, however, there were any remaining interest in said Pico by virtue of the grant to him, the present claimant has succeeded to that interest by virtue of a conveyance made to him by said Pico on the 13th day of January, 1852. This conveyance is given in evidence." (Tr., p. 55.) How the superior court in the case of Pico against Warner could have failed to see that Warner's position as attorney in fact for Pico, on the one hand, and as a representative of his own conflicting interests, before the land commission, was utterly repugnant to the laws governing principal and agent, and that such interests were in

irreconcilable hostility to each other, does not appear. But, however that may be, in this conflict between Warner's self-interest, which dictated that he should extend his own grant over the entire valley, and the interest of Pico, which dictated that all that portion of the valley known as Agua Caliente should be confirmed to Pico, we may be able to account for the fact that Warner did not, in his petition to the Board of Land Commissioners, disclose that he was a mere agent for the Pico grant, but claimed to be its owner. Self-interest may have caused him to conceal the conflict of interest between himself and Pico, which, had it been apparent to the Board of Land Commissioners, would have unfitted and disqualified him for the responsible position of properly prosecuting Pico's case before that tribunal. And this same self-interest may throw some side light on the fact that the impression was created before the board that Pico had possibly abandoned his grant; and this same self-interest may have helped to make it "manifest that the grant to Warner embraced the premises described in the previous grant to Pico," as stated in the opinion of the Board of Land Commissioners; but that even if this was not so, it was not very material, as he had acquired all of the Pico title to the Agua Caliente grant. During the two years between the filing of Warner's petition and the decision of the commission confirming his claim Warner had much time to consider what might be the effect of a decree following the language of his petition and holding

that his claim was based upon *two grants* from the Mexican Government, and that "so much thereof as was known as Agua Caliente was granted to Antonio Pico * * * and had since become vested in the present claimant, and that the *remainder* of said tract was subsequently granted to the present claimant," etc. Such a decree would have been an adjudication that Warner could not have easily evaded in subsequently accounting to Pico. Had such a decree been entered, he could not have said that, without any fault of his, Pico's grant was rejected and Warner's confirmed for the whole valley, and hence he held nothing in trust for Pico. By having himself appointed Pico's agent regarding the Agua Caliente grant, he thereby acquired the power of preventing Pico from contesting his right to float his junior grant over the senior grant to Pico, and it can not be told to what extent this contributed to weakening the showing before the board as to Pico's grant and to strengthening the showing as to his own grant. But, however that may be, he was evidently not guarding himself against the fact of Indian possession of the "Agua Caliente" lands while before the board of land commissioners, as all the evidence there given shows the Indians to have been in possession of the "Agua Caliente" village from the time of the earliest knowledge of the witnesses. We do not mean to concede, by what has been said, that the Pico grant was rejected by the Board of Land Commissioners and the Warner grant alone confirmed, but we insist that in view of the contents of Warner's

own petition before the board, his own pleading in that proceeding,—which alleged his *claim* to be based on two grants from the Mexican nation, "*that so much as is known as Agua Caliente was granted to Pico and has since become vested in the present claimant;* that the *remainder* of said tract was subsequently granted to this claimant," etc.,—*he and his successors in interest are estopped from asserting the contrary;* and that they can not be relieved therefrom by the fact that the decrees of the board and the district court used the word "grant" in the singular and not the word "grants," for it is also "adjudged by the commission that the *claim* of the land petitioned is valid and it is therefore decreed that the same is confirmed." What this "claim" was can be found by referring to the petition, which showed it was based on the two grants, the "Agua Caliente" portion to Pico, the "*remainder*" to Warner. Such was evidently the construction placed upon the decrees by the land department in issuing the patent, for the patent recites that such claim is "founded on *two* Mexican grants, the first made on the 8th day of June, A. D. 1840, to Jose Antonio Pico by Juan B. Alvarado * * * the second made on the 28th day of November, A. D. 1844, to Juan Jose Warner by Manuel Micheltoreno."

We have alluded to this agency of Warner for Pico, and to the conduct between Warner's *interest* as owner, and his *duty* as agent, merely as tending to explain why the commission may have been led to go out of its way, in a matter utterly immaterial to the United States, to contradict Warner's position as to the bound-

aries of his own grant, by expanding them so as to swallow up the Pico grant, and as explaining how there might be a *shortage of evidence* as to Pico's compliance with the terms and conditions of his grant, and a *superabundance of evidence* as to Warner's having complied with the terms of his grant.

Our position is that this senior grant to Pico is—in so far as the Indians are concerned—binding and effective, and never was abandoned, and that plaintiff's title rests upon said grant, in so far as the property here in controversy is concerned, and that it does not rest upon the later grant to Warner as to such property. We think this clearly appears, notwithstanding the language of Commissioner Felch in the opinion of the board of land commissioners relied upon by plaintiffs (see Tr., pp. 54–55). It will be noticed that the decree of the Board of Land Commissioners itself does not perpetuate the statement contained in the opinion as to the rights of the claimant depending entirely upon the later grant to Warner, or as to the Pico grant having been abandoned. Warner appeared by his petition to have acquired all the interest of Pico under the Agua Caliente grant of 1840, *and it did not become a contested fact before the land commission as to whether his rights were derived from the first or second grant. That was not the question in issue.* The proceeding was merely between Warner and the United States. It was immaterial to Warner (except in an effort that might be made by him later to escape his liability to account to Pico as a trustee), and likewise immaterial

to the United States, whether the commission found that Warner was entitled to the property covered by his petition by virtue of both grants or only one. He was only interested in having the entire property confirmed to him, regardless of the superiority or the inferiority of the respective grants under which he claimed (except as to the effect such an adjudication would have upon his subsequent settlement with Pico, of which the commission was not then aware); but that he did claim under and relied upon *both grants* is evident from the language of his petition to the Board of Land Commissioners, and it was unnecessary for the board to determine upon which grant his rights were based. This is shown from the following language of the opinion of the board, viz: "If, however, there was any remaining interest in said Pico by virtue of the grant to him, the present claimant has succeeded to that interest by virtue of a conveyance made to him by said Pico on the 13th day of January, 1852. This conveyance is given in evidence." And in confirmation of this theory, that plaintiffs' title is based upon both grants and not upon the latter grant, the patent from the United States to Warner recites that it is founded upon both grants, giving their respective dates and the names of the respective grantees. This recital absolutely estops plaintiffs, as the successor in interest of Warner, the patentee, from claiming the contrary, as recitals in patents based on Mexican grants bind all parties claiming thereunder.

See *McGarrahan* v. *New Idria Mining Co.* (49 Cal., 335).

It is a settled rule of evidence that the recitals in

deeds, patents and conveyances of a similar nature are binding upon the parties thereto and their privies in estate, in blood, and in law, but are not binding upon strangers or persons who claim by title paramount.

See Best on Evidence, vol. 2, sec. 542; Phillips on Evidence (Cowan Hills & Edwin's notes, vol. 1, page 473, note 130); Id., vol. 2, page 574, note 476; see also note, *Graff* v. *Castleman* (16 Am. Dec., 754).

The fact that the grant to Pico was a valid, binding grant; that there was never any judicial abandonment or forfeiture of the same declared under the Mexican Government or any such adjudication by any tribunal of this Government having jurisdiction of the matter properly before it in a *contested* case, and the fact that Warner acquired the rights that passed by the Pico grant, and in his petition before the land commission relied upon such grant, and the further fact of the recitals in the patent itself that the title was based upon both the Pico and the Warner grants, when taken together, far outweigh the single statement of one of the land commissioners that, in his opinion, the Warner claim must rest entirely upon the grant to Warner; especially so when Warner's motives for having the Pico grant ignored and his own grant approved are taken into consideration; nor does the adjudication in *Pico* v. *Warner* (73 Cal., 17), cited by the court, in the opinion in this case operate as an adjudication in favor of plaintiffs' claim as against defendants here, for the reason that *defendants were not parties to such adjudication nor bound by it.* We therefore contend that it clearly appears

from the evidence introduced and rejected in this case that plaintiffs' title to the property in controversy here, is based upon the grant to Pico, which specifically reserves the Indian rights, and not upon the later grant to Warner, which only reserves the defendants' rights by reserving all existing "servidumbres." In coming to this conclusion, it is important to remember that no mention whatever is made in Warner's expediente about his claim covering any portion of the grant formerly made to Pico, nor is any reference made to Pico's abandonment, nor does it appear that the Pico grant was by the Mexican authorities declared forfeited or lapsed, as an adjudication precedent to the grant to Warner, which certainly would have been done if the authorities had been apprised of the fact that they were to grant land covered by the former grant to Pico. And in this connection it will be borne in mind that no "juridical possession" of the Warner grant was ever given by the Mexican authorities which would call to their mind the boundaries for which Warner was contending. The property is, in every document in the Warner expediente, stated to be owned by the Mission of San Diego, whereas the undisputed evidence, both oral and documentary, in this case shows that all the property covered by the Pico grant was owned by and subject to the jurisdiction of the San Luis Rey Mission. These facts taken together, we think, fully sustain our conclusion that the Mexican Government did not intend to grant to Warner the premises covered by the prior grant to Pico, and further shows that Warner did not

believe that by his grant he had acquired Pico's rights. Otherwise he would not have thereafter taken deed from Pico, and, before the land commission, claimed that his title rested upon the Pico grants as to that portion of the land known as the Agua Caliente, and upon his own grant as to the "*remainder*."

That the lands covered by the grant to Pico of 1840 were known as "Agua Caliente" and were entirely within the jurisdiction of the San Luis Rey Mission, were the property of such mission, and included the property here in controversy, that such lands were in the possession of the Indians when such grant was made, and that both the grant and all the preliminary papers and proceedings leading thereto, provided that the grantee should not molest the Indians established thereon, appears beyond all question from the various papers in the Pico expediente. (See Tr., pp. 28, 29, 30.) We ask the court's careful examination of these papers. The testimony before the land commission clearly showed that the Mission Indians were in possession of the Agua Caliente from a time prior to the grant to Pico. See especially the testimony of John Foster as follows:

> I am acquainted with the ranch called Agua Caliente in San Diego. * * * I passed over the ranch in 1833; the Indians were in possession at that time and have been in possession ever since that time. The Indians had never been expelled from there that I know of. The next thing I knew Antonio Pico was in possession, as I understood, by a grant from the Government. The Indians I have referred to

> as occupying the ranch were Mission Indians. The same Indians were in the employ of Antonio Pico about 1840. * * * Pico's agent occupied the ranch until the lands were transferred, as I understand, to Juan Warner. * * * As a general thing the grants were made with the condition that the Indians be permitted to remain there. The Mission Indians to whom I have referred were the only Indians established on the lands.

Jose Maria Avilla testifies that he knew the Agua Caliente in 1838. He says: "At that time there were Indians living at the Agua Caliente. These Indians were under the administration of the San Luis Rey Mission. Families and small ones, there were more or less than three hundred. I saw these Indians again in 1846. They were living there permanently in houses."

Pio Pico testified:

> I know the Agua Caliente Indian village and Warner's ranch in San Diego County. First knew it in 1820. There were Indians residing there then. Such Indians were subject to the administration of the San Luis Rey Mission. I was administrator of that mission in 1835, up to 1840. I was not at Agua Caliente from 1820 to 1835. There were many Indians at Agua Caliente while I was administrator of the San Luis Rey Mission; maybe more than one hundred. While I was administrator of the mission I had a foreman at the Agua Caliente village. He took up oxen there and put in seeds on their farms, plowed for them, and made a granary. The Indians lived there and worked under

the charge of the foreman. I know nothing about the place after the mission jurisdiction ceased, having never been there since 1840.

J. J. Warner, the grantee and patentee of the ranch, says that these Indians "had been under the control of the San Luis Rey Mission. * * * These Indians were never dispossessed from their place at Agua Caliente that I ever heard of from 1843 until the time I left there (1851)." If they had been dispossessed Warner certainly would have known of it. This of itself is ample refutation of the statement that the land was "vacant" in the prefect's report, if that could be considered as referring to Indian occupancy and as applying to these lands. In addition to this testimony nearly a score of the defendants swore that they were old Mission Indians living at Agua Caliente, and that such Indian village was formerly under the charge of the San Luis Rey Mission before Warner came upon the ranch, and that they were in possession of the land and used the Agua Caliente lands surrounding the Agua Caliente village ever since they were born (and many of them were grown men and women when Warner came on the ranch), and that the Indians had lived there and cultivated and used their lands ever since.

From all this evidence, both oral and documentary, we submit that it unquestionably follows:

1. That the report of the prefect forming a part of the Warner expediente, to the effect that the "Valle de San Jose," the property of the Mission of San Diego, was "vacant and abandoned," could not possibly

operate as an adjudication that no Indians were occupying the land here in controversy—an entirely different piece of land, which was upon the "Agua Caliente tract," within the jurisdiction of and formerly the property of the San Luis Rey Mission, but then owned by Jose Antonio Pico, under a grant made four years before, which specifically provided that the Indians established thereon should not be molested; and certainly the Board of Land Commissioners can not be considered as having found that there were no Indians in possession when either of the grants were made, for there is no finding upon that subject whatever, and the undisputed evidence before the board conclusively shows the Indians were in possession of the Agua Caliente when *both grants* were made.

It therefore follows that there was no adjudication by the Mexican Government that *these* lands were vacant or that no Indians were in possession when the grant to Warner was made, and hence we are not precluded on that ground from showing such Indian possession by proper evidence.

The evidence examined also clearly shows—

2. That the grant of 1840 to Jose Antonio Pico of the Agua Caliente was regular and valid in all respects, and included the lands here in controversy, and showed Mission Indians to be in possession and specifically provided that their right of possession should not be prejudiced; that this grant was never treated as lapsed or abandoned by the Mexican authorities, and that the land was never granted to any one else; that Warner

treated it as valid by subsequently obtaining deed of it from Pico, and that thereafter he presented to the Board of Land Commissioners a petition asking confirmation of his claim to a tract of land known as "Valle de San Jose and Agua Caliente," and stated "that so much of said land as is known as *Agua Caliente* was on the 8th day of June, 1840, granted to Jose Antonio Pico, and had since become vested in Warner" (never even hinting that it had been forfeited, lapsed, had been abandoned, or possessed any other defect), "and that the *remainder* of said tract" was granted to Warner in 1844 (never claiming that there was any conflict or overlapping between the two grants, or that his included the Pico grant, but clearly alleging the contrary by confining *his grant* to the "*remainder*" of said tract), and stating that his claim for confirmation of title to the land was based upon such *two* grants.

His "*claim*" was confirmed and patented, and the patent recites that it is founded *both* upon the Pico and Warner grants. There was no issue or contest between the grants before the commission, as they appeared to be both vested in Warner, and if the whole body of land was confirmed to him the exact amount derived from each source became unimportant, and was evidently considered so by the board and court, and the use of the word "grant" instead of "grants" in the decrees therefore becomes insignificant. There was no controversy on the subject, and the result was alike immaterial both to the United States and to Warner. It must therefore be conceded that Warner and his

successors are estopped from denying that "so much of said land as is known as the 'Agua Caliente' was granted to Jose Antonio Pico," whose grant by its express language reserved the right of the Indians; and we therefore submit that this case in that respect is identical with and can not be distinguished from *Byrne* v. *Alas*.

From the foregoing analysis of the testimony, we submit that it is clear:

First. That this case can not be distinguished from *Byrne* v. *Alas* in so far as the report of the prefect on the San Jose tract that it was "*vacant*" is concerned, as the grant there involved did likewise.

Second. That the words "vacant and abandoned" used in such report refer only to the occupancy of the proprietor of that tract, the San Diego Mission, and not to the Indian occupancy on the other tract, "Agua Caliente," under the other mission, viz, San Luis Rey.

Third. Even if these words be considered as referring to Indian occupancy, the report did not operate as an *adjudication* concluding the Indians, but at best was only in the nature of evidence, and subject to be overcome by better evidence, and has been completely disproven by the evidence in this case.

Fourth. The evidence unmistakably shows that such investigation and report referred to a tract of land entirely distinct from the tracts here in controversy, and therefore has no bearing as to the possession of these tracts, either as an adjudication or as evidence.

Fifth. That plaintiffs' title rests upon the senior grant of 1840 to Jose Antonio Pico, which by express

language provides that the grant should not prejudice the rights of the Indians that thereon may be established, making this case identical with *Byrne* v. *Alas* in that respect.

Fifth.

THERE HAS NEVER BEEN ANY DECISION OF THE LAND COMMISSIONERS, OR OF ANY OTHER OFFICERS OF THE UNITED STATES, HOLDING, EITHER "IN EFFECT" OR DIRECTLY, "THAT THE LAND IN QUESTION WAS VACANT AND SUBJECT TO ABSOLUTE ALIENATION," SO AS TO CONCLUDE THE THIRD PERSONS REFERRED TO IN THE ACT OF MARCH 3, 1851; AND THAT HAD SUCH COMMISSIONERS AND OFFICERS SO HELD, SUCH HOLDING WOULD NOT BE BINDING UPON "THIRD PERSONS," AS SUCH TERM IS USED IN THAT ACT.

In support of this position we refer to the opinion and decree of the Board of Land Commissioners and the decree of the district court, which do not hold or find that the land is "vacant" or subject to "absolute" alienation. The decree of the board merely holds that "the claim of the land petitioned is valid, and it is therefore decreed that the same be confirmed." Both decrees are utterly silent as to the land being "vacant" or as to the "absoluteness" of the title confirmed, as these were matters with which the commission and the court were not concerned, for the statute under which such tribunals were acting provided that their decrees should "be conclusive between the United States and said claimants only, and shall not affect the interests of third persons." Such tribunals were, therefore, interested only in determining the title as between the

United States and the claimant and all parties claiming under the Government by titles subsequent, and *the language of the statute to that effect must be read into each decree.* So well understood was this that all patents issued in pursuance of such decrees contained such a provision. See the patent here (p. 37 of the transcript), which provides "that in virtue of the fifteenth section of the said act *neither the confirmation of this said claim nor this patent shall affect the interests of third persons.*"

It must be apparent from the foregoing that there is no finding of the commission, or the district court, or of the Land Office, either directly or "in effect," that the land is "vacant" or that it is subject to "absolute" alienation. But had such a finding been made and even perpetuated in the patent it would not have concluded those who were third persons under the fifteenth section of the act of March 3, 1851. The position that the patent is conclusive against such persons upon such matters is untenable.

In its fullest sense it is not even true as to ordinary patents in which the title was *originally conceded to be in the United States*, except as to *contested questions of fact* in issue before the Land Office, in the progress of proceedings for the issue of patents, and even then is not conclusive as against fraud, *mistake, or misconstruction of the law*, and certainly it is not true, and has never been held to be true, as to lands *covered by Mexican grants, to which the United States never asserted title*, and as to patents that do not purport to bind anyone but

the *patentee, the United States, and parties claiming under the United States by title subsequent.*

No authority can be produced to refute this proposition. The books are full of authorities holding that in a suit *at law* a patent of the United States can not be collaterally attacked where the title was conceded to be in the United States at the time the patent was issued, and the officers issuing the patent acted within the scope of their jurisdiction. In such cases by law a decision of the Land Department on all contested questions of fact is—in the absence of fraud or misconstruction of the law—made conclusive upon all the world; whereas, by the act of March 3, 1851, an entirely different rule is established as to the parties other than the claimant, the United States, and those claiming under the United States by title subsequent. In other words, *such act makes a special exception as to the conclusiveness of patents issued thereunder in favor of parties holding by title anterior and paramount to that confirmed and patented.*

The undisputed testimony before the Board of Land Commissioners upon the confirmation of the grants upon which plaintiffs here rely (see Tr., pp. 33–34) shows that the Indians were in possession of the land here claimed and that the same was not vacant; and there is no finding of the commission or court to the contrary; but had there been such a finding, it would not have affected the rights of "third persons" preserved by the statute, nor precluded such parties so in possession from afterwards showing the fact of their

possession. In this respect proceedings under the act differ vitally from proceedings had in the land office in ordinary cases for disposing of land, title to which was admittedly in the United States Government. In such a case, a finding of the land office that the lands to be granted were vacant lands, and such as could be granted, would be conclusive as against *all parties*, and the whole world would thereafter be estopped from proving the contrary. The reason of this is that such proceedings were intended to be final, binding, and conclusive as to *everyone;* whereas, under the provisions of the act of March 3, 1851, proceedings had thereunder *were not intended to bind parties asserting valid conflicting claims to the property by title paramount and anterior to that confirmed.* All the cases, both State and Federal, hold this.

Sixth.

DEFENDANTS' RIGHTS WERE PRESERVED BY VIRTUE OF THE SIXTEENTH SECTION OF THE ACT OF CONGRESS OF MARCH 3, 1851, EVEN THOUGH THEY WERE NOT SUCH "THIRD PERSONS" AS WERE PROTECTED BY THE TERMS OF SECTION 15 OF SUCH ACT.

In this connection we merely call the court's attention to the language contained in *Byrne* v. *Alas*, as follows, where it is said:

> Furthermore, section 16 of the act of Congress of March 3, 1851, provides that "it shall be the duty of the commissioners herein provided for, to ascertain and report to the Secretary of the Interior the tenure by which the

mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind; also those which are occupied and cultivated by Pueblo and Rancheros Indians."

This language indicates that Congress did not intend that the rights of the Indians should be cut off by failure on their part to present their claims, but that it should be the duty of the commissioners to ascertain and report the tenure by which they held their lands. And this is in harmony with the argument made in their behalf by Mr. Jones.

Independent of all that has been said in this brief on the subject of these defendants being such "third persons" as were not bound to present their claims to the Board of Land Commissioners for confirmation, and independent of the provision of the act itself protecting the rights of such third persons, we feel that we would be safe in relying entirely upon section 16 of such act above quoted, as relieving these defendants from all necessity of presenting their claims to the board. Under the Spanish and Mexican Governments, these Indians were treated as wards of the Government, and such Governments regarded themselves as their special guardians. Being wards of the former nation, by the change of sovereignty they became wards of this nation, and being such they were not charged with knowing there was a land commission, or required to present their claims to it, or even chargeable with knowledge of the law generally.

And knowing their helpless condition and their inability to protect and preserve their own rights and titles at the time of the transfer of sovereignty, it was but natural that some such clause as section 16 should have been inserted in this act, so that the duty devolving upon the ordinary claimant of presenting his claims and making his proof of title, should, in the instance of the Indians, be shifted upon the shoulders of the land commissioners themselves; and the failure of such commissioners to perform their duty in the premises, if they did fail, can not be invoked as a ground for forfeiture of the rights of the Indians. It is to be presumed that the nation has always recognized and protected these customary rights of its wards.

Seventh.

THE DEFENDANTS HAVE ACQUIRED A PRESCRIPTIVE RIGHT TO THE USE OF THESE LANDS.

The evidence shows that patent issued in 1880 and suit was not brought until 1892, twelve years later.

This prescriptive right is pleaded in the answer (see Tr., pp. 6, 9, and 11), and is fully sustained by the testimony, provided the payment of taxes is not a prerequisite to obtaining the right by prescription to the easement, servitude, or usufruct claimed by these defendants.

The defendants here are not claiming *title* to the *lands* in controversy, but merely a usufructuary interest, an incorporeal hereditament or servitude in gross, such as is referred to by the court in *Smith* v. *Cooley* (65 Cal., 46, 49) in treating of a mining right, as follows:

> This particular estate, or incorporeal hereditament, is what is known in law as a servitude in gross, or a personal servitude imposed upon land for the benefit of the person or persons owning the right, irrespective of the ownership of the land. The right is usufructuary in its nature and character, and entitles the owner to the use of the land for the profits which may be derived from its rents or from quarrying and digging in it for ores or from harvesting its fruits, crops, vintages, etc.

So of an Indian claim of use and occupancy. It is a servitude in gross, usufructuary in its nature—originating in the original possession of the territory by the ancestors of these very people—validated by the successive decrees, acts of parliaments, or other legislative bodies of Spain and Mexico. As an easement or servitude in gross or usufructuary interest it is not such a claim of title to land as is contemplated by section 325 of the Code of Civil Procedure of California, making payment of taxes levied and assessed on land a prerequisite to a right by prescription or adverse possession. The provision of the California code requiring payment of taxes as an element in acquiring title by adverse possession reads as follows: "Provided, however, that in no case shall adverse-possession be considered established, under the provisions of any section or sections of this code, unless it shall be shown that the land has been occupied and claimed for a period of five years continuously and the party

or persons, their predecessors, and grantors have paid all the taxes, State, county, or municipal, which have been levied or assessed upon such land."

See sec. 325, Cal. Code of Civil Procedure.

That this section has no application to a mere usufructuary right or easement, see *Frederick* v. *Dickey* (91 Cal., 358), where it is said:

> So the payment of taxes is necessary to the successful assertion of title as provided now by statute, *but that requirement does not apply to a mere easement*, which is not separately assessed for the purpose of taxation.

The property rights claimed by defendants are property of "Indians not taxed," as referred to in the Constitution of the United States and of California, and the presumption is that the assessor, knowing the law, did not tax the Indian right of use and occupancy, for, as said in *Coonradt* v. *Hill* (79 Cal., 587, 593), "In the absence of testimony it is presumed that the advantages and disadvantages * * * have been considered in assessing the land," and that hence—the assessor realizing that the value of plaintiffs' interest in these lands was largely diminished, owing to the Indian right of occupancy—this "disadvantage" was fully "considered in assessing the land" to plaintiffs, and that their assessment was correspondingly reduced. These are propositions to which we wish to call the court's attention as having a bearing upon the admitted fact that plaintiffs have paid all taxes that

have been levied and assessed on these lands since patent issued.

The plaintiffs in error in this action are not claiming the *title* to the *land* involved, but merely a usufructuary interest therein, and the finding that plaintiffs have paid all taxes, etc., "is answered by the fact that it does not appear that any taxes have ever been levied or assessed" upon the usufructuary interest in question to defendants or plaintiffs, "or to any person or persons known or unknown." *Heilbron* v. *Water Ditch Co.* (75 Cal., 117–123).

But even though the usufructuary rights of the Indians were assessed, and the taxes thereon paid by the plaintiffs, it is immaterial, as payment of taxes upon the same is not made a requisite of acquiring prescriptive title to such an incorporeal hereditament—all the other elements of adverse possession existing as they do here.

Eighth.

THIS COURT SHOULD, UPON THE RECORD BEFORE IT, DECIDE THE ENTIRE CONTROVERSY, BOTH AS TO THE LAW AND THE FACTS.

The decision of the trial court and of the California supreme court was based solely upon questions of law and not upon any conflict as to the facts. All of defendants' evidence was held to be inadmissible, and was stricken out as being immaterial over three years after the evidence was all in, and the case closed and submitted to the court. There is practically no controversy as to the facts, and there can be no doubt that

the evidence introduced, but afterwards stricken out, showed that the defendants and their ancestors were Mission Indians, and that they had been in the actual possession, use, and occupancy of the property in controversy since a time long prior to the inception of plaintiffs' title; and if the court shall hold with us that the testimony introduced by the defendants was *material*, and *was improperly stricken out, we ask that this court decide the entire controversy, both as to the law and the facts;* as the whole case is in the transcript and before the court, just as though the objections to the testimony offered by defendants had been overruled. The case presents the anomaly of having been decided entirely upon the law, yet of presenting all of the facts to which the law is applicable, so that the appellate court is not embarrassed by any findings upon conflicting facts, yet is able from the record made, to finally pass upon the effect and sufficiency of the facts. Our point is, that the case was as fully tried and presented on both sides in the trial court as if the evidence offered by the defendants were to remain permanently in the case—that is, it was tried by plaintiffs upon the theory that plaintiffs' objections to defendants' testimony might subsequently be overruled by the court—and therefore it can work no hardship upon the plaintiff—if the striking out of defendants' evidence was error—to have the entire case now passed upon as thus made. Defendants should not be put to the trouble and expense of a trial *de novo*, but are entitled to judgment *upon the case already made*, especially as many of the principal wit-

nesses for defendants—being very old men—have died since the case was tried, and if the case were sent back for decision of the trial court upon the case as made by the record, no advantage would follow from such a course, as the judge who tried the case is no longer on the bench, and the manner of the witnesses when on the stand could not be taken into consideration as an aid to a correct conclusion, and, furthermore, there is substantially no controversy as to the facts. We submit, therefore, in view of all of these considerations, that there is no advantage to anyone in having the facts passed upon by a local court, or any reason why, upon the record before it, this court can not do full and final justice to all, both upon the law and the facts.

CONCLUSIONS.

In conclusion, we submit that as we have shown there was no adjudication by the Mexican Government that these lands were not in the possession of Indians, we were not precluded from showing Indian possession; and as the evidence conclusively shows such possession from a time long prior to the grants under which plaintiffs claim, it follows that under the Spanish and Mexican law, independent of any reservations in the grants, the grantee acquired merely the legal title, subject to the continued right of use and occupancy in the Indians; and that here this right is preserved by the very language of plaintiffs' grants; that such right of use and occupancy, being a valid

right under the former sovereignty, it was not extinguished by the confirmation and patent to Warner; but such confirmation and patent merely established the legal title to be in Warner, just as before the change of sovereignty, but did not change the characteristics of his title so far as the Indians were concerned, but operated to relieve them of the necessity of presenting their claims for confirmation. But, independent of all other considerations, these defendants being wards of the nation, the provisions of the act of March 3, 1851, were not intended to be binding upon them, and this was recognized by making it the duty of the land commissioners to ascertain and report as to their titles.

That these defendants have acquired a prescriptive right to the use and occupancy of these lands by reason of their twelve years' adverse user subsequent to the issuing of the patent and prior to the bringing of this action.

We submit that upon the record here presented that the court should determine this entire controversy, both as to the law and the facts. We also ask that case No. 210, Quevas et al., plaintiffs in error, *v.* Harvey, be submitted upon the briefs and the arguments in this case.

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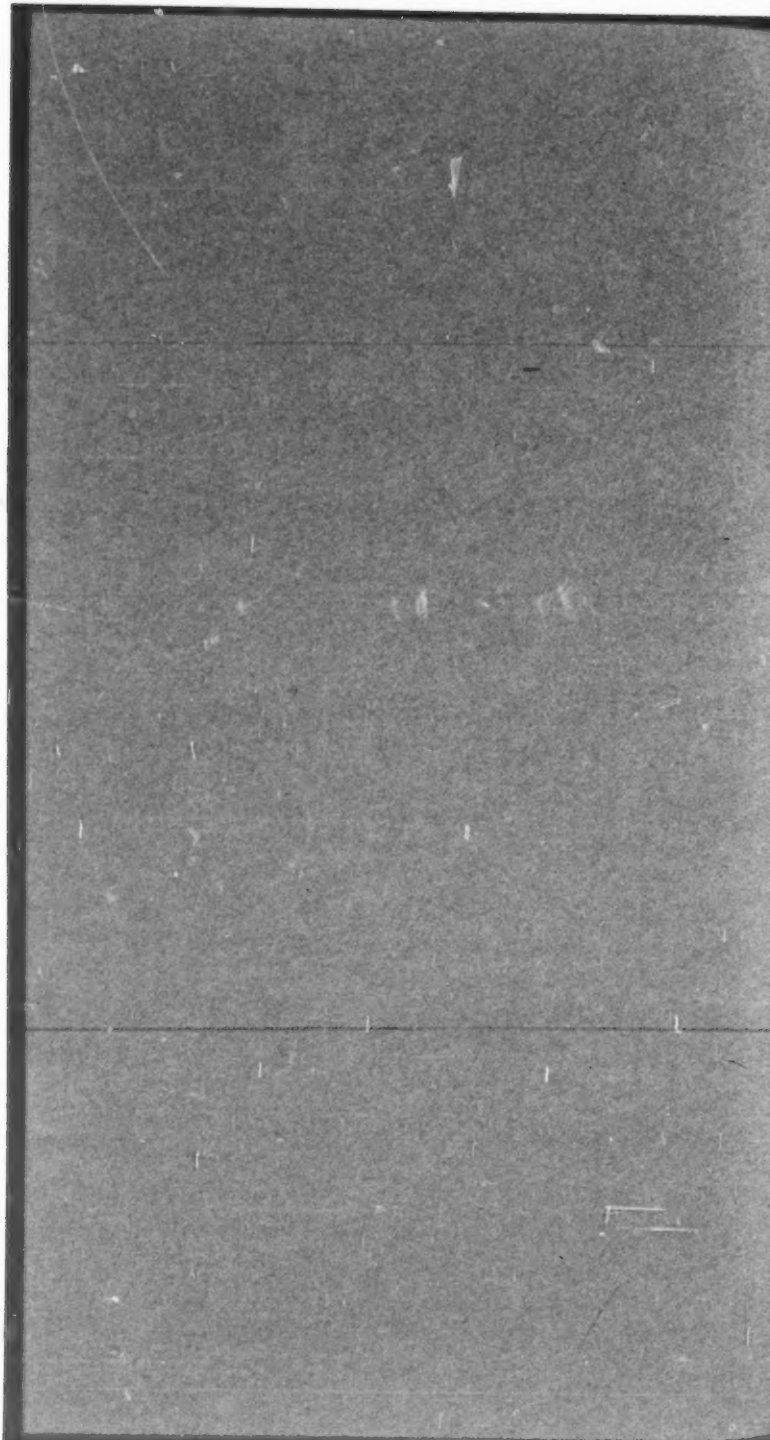
In the Supreme Court of the United States.

OCTOBER TERM, 1900.

JOSE QUEVAS ET AL., PLAINTIFFS IN ERROR,
v.
J. DOWNEY HARVEY, ADMINISTRATOR.
} No. 210.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE PLAINTIFFS IN ERROR.



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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE PLAINTIFFS IN ERROR.

This case involves the same principles of law as are involved in the case of Allejandro Barker et al., plaintiffs in error, *v.* J. Downey Harvey, administrator, et al., being case No. 209 now pending in this court, and it is entirely unnecessary to repeat here all that has been said in the brief of plaintiffs in error in that case; and for that reason plaintiffs in error here ask leave to submit this cause upon the brief already filed, and such briefs as may be hereafter filed. The cases are practically identical, with this exception, that in this case the defendants do not claim that plaintiff derived title through a grant from the Mexican Government, which,

in specific words, mentioned and reserved the rights of the Indians therein *by name*, as is claimed to be the case in Barker *v.* Harvey; but defendants here concede that the Mexican grant, through which plaintiff derived title, does not *by name* reserve the Indians' rights, but that, nevertheless, such grant, by its *general language*, which provides that the grantee shall not interfere with the "usages" (*servidumbres*, Tr., page 29), does reserve such possessory rights of the Indians just as effectually as if their rights had been designated by name. With this slight difference the cases, as they present themselves in this court, are identical. Hence it is, plaintiffs in error here submit this case upon the brief in the Barker case.

Respectfully submitted.

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